Office-Supreme Court, U.S.
FILED
JUN 20 1985
ALEXANDER L. STEVAS,
CLERK

84-1982 1

No.: ________

IN THE

Supreme Court of the United States

October Term, 1984

DOMINIC TUFARO and RONALD MARRAZZO,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GERALD L. SHARGEL
Attorney for Petitioner Dominic Tufaro
150 East 58th Street
New York, New York 10155
(212) 486-1717

ROBERT ELLIS
Attorney for Petitioner Ronald Marrazzo
900 Third Avenue
New York, New York 10022
(212) 593-3440

STEVEN ALAN REISS
Of Counsel and
On the Brief

93 pp

Question Presented

Does *Franks v. Delaware,* 438 U.S. 154 (1978) apply to the statutory requirements of the wiretap act (18 U.S.C. § 2510 *et seq.)?*

List of Parties

Although there were many other defendants at trial and two other appellants in the Court of Appeals, the issue raised herein applies only to the parties named in the caption of this Petition.

Table of Contents

Question Presented i

List of Parties i

Table of Authorities ii

Opinions Below 1

Jurisdiction 2

Statutory and Constitutional Provisions Involved in This Case 2

Statement of the Case 3

Evidence at Trial 3

Reasons for Granting the Writ 5

A. Introduction 5

B. The Court of Appeals Incorrectly Held That *Franks v. Delaware* Does Not Apply to the Statutory Requirements of the Wiretap Act, 18 U.S.C. § 2510 *et seq.* 8

Conclusion 12

Appendix A — Opinion of United States Court of Appeals 1a

Appendix B — Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc 7a

Appendix C — Decision of United States District Court 9a

Table of Authorities

Cases:

Berger v. New York,
388 U.S. 41 (1967) 10

Franks v. Delaware,
438 U.S. 154 (1978) 1, 7, 8, 9, 10, 11, 12

United States v. Bobo,
477 F.2d 974 (4th Cir. 1973) 10

United States v. Cox,
462 F.2d 1293 (8th Cir. 1972) 10

United States v. Cox,
449 F.2d 679 (10th Cir. 1971),
cert. denied, 406 U.S. 934 (1972) 10

United States v. Fury,
554 F.2d 522 (2d Cir.),
cert. denied, 436 U.S. 931 (1978) 10

United States v. Giordano,
416 U.S. 505 (1974) 8

United States v. Kalustian,
529 F.2d 585 (9th Cir. 1975) 10

United States v. Lilla,
699 F.2d 99 (2d Cir. 1983) 7

United States v. Mulligan,
573 F.2d 775 (2d Cir.),
cert. denied, 439 U.S. 827 (1978) 6

United States v. Napolitano, et al.,
No. 82-CR-803 (RWS) (S.D.N.Y. 1982) 6

United States v. Wac,
498 F.2d 1227 (6th Cir. 1974) 8

United States Constitution:

Fourth Amendment 2

Statutes:

18 U.S.C. § 2510 *et seq.* .... i, 8
18 U.S.C. § 2518 ....2, 7, 11
21 U.S.C. § 841 3
21 U.S.C. § 846 3
21 U.S.C. § 848 3
28 U.S.C. § 1254(1) 2

No.: ________

IN THE

Supreme Court of the United States

October Term, 1984

DOMINIC TUFARO and RONALD MARRAZZO,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Dominic Tufaro and Ronald Marrazzo, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction entered against them by the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the Court of Appeals appears in the appendix hereto at pp. 1a-6a; that court's denial of petitioners' motion for a rehearing, with a suggestion that it be *en banc,* appears at pp. 7a-8a; the opinion of the District Court follows at pp. 9a-75a.

JURISDICTION

The date of judgment of the United States Court of Appeals was April 22, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Title 18, United States Code, Section 2518(1), provides in relevant part:

> Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information: . . .
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear unlikely to succeed if tried or to be too dangerous;

STATEMENT OF THE CASE

Petitioners Tufaro and Marrazzo were convicted of conspiracy to distribute heroin (21 U.S.C. §846); two counts of possession and distribution of heroin (21 U.S.C. §841), and conspiracy to violate the RICO statute (18 U.S.C. §1962). In addition, Tufaro was found guilty of conducting a continuing criminal enterprise (21 U.S.C. §848).

Tufaro was sentenced to 40 years imprisonment without parole on the §848 charge. He was sentenced to 30 years on the conspiracy charge and 10 years on one of the §841 charges, to run consecutively to each other but concurrently to the §848 sentence.[1] He was also sentenced to 20 years on the second §841 charge and 20 years on the RICO violation, again to run consecutively to each other but concurrently to the §848 charge.

Marrazzo was sentenced to concurrent terms of 15 years imprisonment on the conspiracy and first §841 charge, followed by concurrent 10 year sentences on the second §841 and RICO violations. In addition, he received a total of $100,000 in committed fines.

EVIDENCE AT TRIAL

Petitioners have been sentenced to spent most, if not all, of the rest of their lives in prison solely as a result of evidence obtained through electronic eavesdropping. Other than the recordings made from this electronic surveillance and the transcripts produced from those recordings, the government presented virtually no substantive evidence against them at trial. This assessment of the evidence is not only petitioners', but the trial court's as well:

---

[1] **The Court of Appeals subsequently vacated the sentence on the conspiracy charge because it was improper for Tufaro to be sentenced both on that charge and on the §848 violation. (*See* p. 5a.)**

> THE COURT: . . . The whole case stands or falls on transcripts and they are entitled to have the charge.
>
> Has it ever been the case that it stands entirely on transcripts like this one?
>
> MR. MARTIN: [one of the prosecutor]: Sure.
>
> MR. CARUSO: [the other prosecutor]: Of course.
>
> MR. MARTIN: There have been a number of them.
>
> THE COURT: No substantive evidence? (T. 2683)[2]

Despite three months of Orwellian scrutiny, Tufaro and Marrazzo were never observed with heroin in their possession, never arrested with heroin in their possession, and never stopped with anyone who had heroin in his possession. No heroin was ever seized from their apartments. No witnesses testified that they bought heroin from them, sold heroin to them, or engaged in any heroin transactions with them.

Instead, the government's proof consisted of tapes, transcripts of tapes, and witnesses interpreting the tapes. These witnesses testified that virtually everything that the individuals involved in this case discussed on the tapes — going to lunch, going to dinner, going to tailors, and even eating pizza — related to narcotics activity. (T. 467-478, 910-919, 989-990, 1009-1016)

As we explain below, these tapes should have been suppressed.

---

[2] Numbers in parenthesis preceded by "T" refer to pages in the transcript of trial.

REASONS FOR GRANTING THE WRIT

A. Introduction

The prosecution of Dominic Tufaro and Ronald Marrazzo was based solely on evidence gathered through a wiretap on the telephone of Frank Pasqua, Jr., ("Pasqua Tap"), a wiretap on the telephone of Susan Kantor, and an eavesdropping device in Kantor's apartment (collectively, "Kantor Devices"). These listening devices were authorized by warrants issued by three different judges. It is noteworthy, that all of the information supplied by the government to justify installing the Kantor Devices was either identical to that submitted to justify placing the Pasqua Tap or was generated by the Pasqua Tap itself.

The application for the Pasqua Tap was supported only by an affidavit by Special Agent Robert Liberatore of the Federal Bureau of Investigation (FBI). As the trial court stated: "Agent Liberatore [did] not purport to have any first-hand knowledge of any narcotics-related activities on the part of Pasqua, Jr., or any other defendant." (p. 12a) Rather, Liberatore related information obtained from other FBI and Drug Enforcement Agency (DEA) agents — principally information from three unnamed confidential informants designated Sources A, B and C (pp. 12a-13a).

Source A had little information to offer relevant to the Pasqua Tap. He did not mention Frank Pasqua, Jr., or Ronald Marrazzo and had not been in contact with Dominic Tufaro since 1975 — some seven years before the Pasqua Tap was authorized. Source A merely "informed" the agents that Tufaro had been a fugitive since that time, a fact they no doubt already knew, and told them that he had heard from some of Tufaro's associates (unnamed) that Tufaro continued to control a drug distribution network through several closely trusted friends. Source A did not link Tufaro to the telephone that was to be tapped; and he did not provide any first-hand information that a crime was being committed.

Source C apparently had *no* information to offer relevant to the Pasqua Tap. Allegedly, Source C was involved, along with an undercover agent, in buying narcotics from two individuals whom Source C coincidentally identified as customers of Tufaro and Marrazzo. But Source C did not link the individuals to Tufaro or Marrazzo — and did not mention Frank Pasqua Jr., at all.

Clearly, then, the information provided by Sources A and C could not provide the basis for the Pasqua Tap. Source B was the foundation upon which the government's case was built. Or, as the trial court put it, "the information most crucial to the [Liberatore] affidavit [was] that provided by Source B." (p. 13a) Indeed, even the government conceded that Source B's information was "essential" to establishing probable cause for the Pasqua Tap. (Govn't Memo, In Opposition to Defendants' Pre-Trial Motions at 35).

Yet notwithstanding his central role in this case, Source B was never named by the government. On the other hand, petitioners contended in sworn affidavits the he was Dennis Mulligan, an associate of theirs. If petitioners are correct that Source B was Dennis Mulligan, then the electronic surveillance in this case must fall. First, Mulligan's close relationship with Tufaro and Marrazzo belied the government's claim that electronic surveillance was necessary because alternative investigative procedures were inadequate. Second, Mulligan is a convicted perjurer (*see United States v. Mulligan*, 573 F.2d 775 (2d Cir.), *cert denied,* 439 U.S. 827 (1978)), who, at approximately the time he became active as Source B, had a major RICO indictment against him dropped "to facilitate an ongoing investigation." *See United States v. Napolitano, et al.,* No. 82-CR-803 (RWS) (S.D.N.Y. 1982). Neither fact was included in the affidavit submitted by Agent Liberatore in support of the application for the original Pasqua Tap.

In both the District Court and the Court of Appeals, petitioners advanced two statutory grounds for obtaining a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), to determine the identity of Source B and the information to be supplied to the government.[3] First, they argued that a hearing was necessary to explore the material misstatements and omissions in the application for the Pasqua Tap which relate to the alternative investigative procedures requirement of 18 U.S.C. § 2518(1)(c). The government secured the Pasqua Tap by claiming that access to Tufaro and Marrazzo could not be accomplished by any other means. Yet, if Source B is Dennis Mulligan, the government clearly violated the less intrusive means requirement of § 2518(1)(c). The uncontradicted sworn testimony of Tufaro (Aff. In Support of Motion to Suppress at para. 6) and Marrazzo (Aff. In Support of Motion to Suppress at para. 2) makes clear that Mulligan was very close to these men and in constant contact with them. Surely, if § 2518(1)(c) has any substance, the government's failure to exploit a relationship as close as the one between Mulligan and petitioners cannot be condoned. *See United States v. Lilla*, 699 F.2d 99 (2d Cir. 1983).

Second, petitioners argued that a *Franks* hearing was necessary because if Source B is Dennis Mulligan, the government's application for a warrant authorizing the Pasqua Tap was fatally defective since it did not contain important information about Mulligan — namely, that he had been convicted of perjury and that a major prosecution against him had been dropped. Thus, the application did not satisfy the requirement of 18 U.S.C. § 2518(1)(b) that "a full and complete statement of the facts and circumstances relied upon by the applicant" be made.

---

[3] Petitioners also argued that they were entitled to a *Franks* hearing to determine whether probable cause existed for the issuance of the wiretap orders. That argument, however, is not pressed here.

Hence, petitioners argued that, under the rule of *Franks v. Delaware, supra,* they are entitled to a hearing at which they could challenge the veracity of the Liberatore affidavit as it related to the statutory requirements of the wiretap act.

B. The Court of Appeals Incorrectly Held That *Franks v. Delaware* Does Not Apply to the Statutory Requirements of the Wiretap Act, 18 U.S.C. § 2510 *et seq.*

As a preliminary matter, it is important to note the rather disturbing fact that after four and a half months of deliberation the Court of Appeals saw fit to issue a seven-page summary opinion deemed to be of such dubious worth that it was expressly accorded no precedential value.[4] In a case such as this, where there was a two-month trial after which Tufaro was sentenced to 40 years without parole and Marrazzo to 25 years, this minimal product could be justified only if the appeal involved no substantial legal issues. This, however, was plainly not the case here. One need not go beyond the actions of the District Court to establish that. The trial judge took three months and 90 pages to decide the suppression issues; and he forthrightly acknowledged the substantiality of several of those issues including the issue raised herein, during the sentencing proceedings. (Sent. Min. at 21-22.)

---

[4] The Court of Appeals stated: "Since this statement does *not* constitute a formal opinion of this Court and is not uniformly available to all parties, it shall *not* be reported, cited or otherwise used in unrelated cases before this or any other court."

[5] Because the subsequent electronic surveillance orders were based on information gathered from the first wiretap, if the first order should not have been issued, the subsequent orders must also fail. *See United States v. Giordano,* 416 U.S. 505 (1974); *United States v. Wac,* 498 F.2d 1227, 1231-1232 (6th Cir. 1974).

Beyond the very troublesome manner in which it disposed of this case, the Court of Appeals summarily —and wrongly— decided an important and novel question of law, namely whether the holding of *Franks v. Delaware, supra,* 438 U.S. 154, applies to the requirements of the wiretap statute as well as to determinations of probable cause. The court held that "a *Franks* hearing is appropriate only 'if the allegedly false statement is necessary to the finding of probable cause'." (p. 4a) Consequently, it refused to examine the propriety of holding a *Franks* hearing where, as here, governmental misstatements and omissions misled the court issuing the wiretap order[5] into erroneously finding that less intrusive investigative techniques were inadequate or unavailable.

The Court of Appeals clearly erred in deciding that *Franks* does not apply to the substantive requirements of the wiretap statute. Moreover, its summary treatment of this important issue was wholly inappropriate. To our knowledge, the court's decision constitutes the first and only federal appellate ruling on the applicability of *Franks* to the requirements of the wiretap statute. Both the difficulty of this issue and its significance warrant far greater consideration than the Court of Appeals gave it.

In *Franks,* this Court held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and with the affidavit's false material set to one side, the

> affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-156. Although it specifically addresses the probable cause question at issue in the case, *Franks* ultimately stands for the proposition that the government cannot be permitted to obtain a search warrant by misleading the issuing judge as to the justification for the warrant.

A wiretap order is, of course, a type of search warrant. *United States v. Fury,* 554 F.2d 522, 530 (2d Cir.), *cert. denied,* 436 U.S. 931 (1978). Like the probable cause requirement, the alternative investigative procedures requirement set forth in 18 U.S.C. § 2518(1) (c) is constitutionally derived and designed to address Fourth Amendment concerns. *See Berger v. New York,* 388 U.S. 41, 63 (1967); *United States v. Kalustian,* 529 F.2d 585, 588 (9th Cir. 1975). Indeed, the wiretap statute "has been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny." *Id.* at 589. *See also United States v. Bobo,* 477 F.2d 974 (4th Cir. 1973); *United States v. Cox,* 462 F.2d 1293 (8th Cir. 1972); *United States v. Cox,* 449 F.2d 679 (10th Cir. 1971), *cert. denied,* 406 U.S. 934 (1972).

If, as the Court of Appeals summarily decided, no *Franks* hearing is available to examine substantial claims that the government has either knowingly or with reckless disregard made false statements concerning its obligation to meet the constitutionally based requirements of the wiretap statute, then the government will have free reign to avoid these requirements through deliberate indifference and even outright perjury. The procedure by which the government obtains authorization to install wiretaps and bugs is *ex parte.* The issuing Judge or magistrate must rely exclusively on information presented by the government. Given the exigencies of law enforcement, the need for the government to proceed *ex parte* prior to the installation of an eavesdropping device is critical. The decision of the Court of Appeals, however, renders representations made by the government during these *ex parte* proceedings forever free from any adversarial scrutiny. While a legitimate law enforcement interest may be served by a rule that so completely insulates the government's *ex parte* representations from scrutiny, we have been unable to conceive of any such interest and neither the government nor the Court of Appeals has advanced one. Indeed, the court said nothing at all on the matter.

If *Franks* is applicable to the requirements of the wiretap statute, there is no question that petitioners have made a sufficiently substantial preliminary showing to warrant a hearing. There are three highly material facts that the government either knew or should have known and that were concealed from the judges who issued the surveillance warrants. First, the government never revealed the intimate relationship between its critical informant — "Source B" — and petitioners. Second, the government never revealed that Source B was a convicted perjurer, whose perjury conviction had been sustained. Third, the government never revealed that serious pending charges against Source B had been dropped in exchange for information in this case.[6]

The first fact is significant because it establishes that the government did not satisfy the alternative investigative techniques requirement of § 2518(1) (c). The second and third facts are significant because they establish a pattern of a lack of governmental candor in dealing with the judges issuing the wiretap orders that strongly corroborates petitioners' contention that the government intentionally misled these courts on the availability of alternative investigative techniques.

---

[6] The court did not find that Agent Liberatore, the agent who swore out the affidavit upon which the first wiretap order was issued, has not made any material misstatements or omissions. It simply determined that "any misstatement or omission that arguably might have existed was not material to Judge Costantino's finding of probable cause." (p. 4a)

The Court of Appeals summarily — and incorrectly — decided that *Franks v. Delaware* does not apply to the requirements of the wiretap statute beyond the requirement of probable cause. This case presents an important issue in the administration of federal criminal justice that this Court should resolve.

Conclusion

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

GERALD L. SHARGEL
Attorney for Petitioner
Dominic Tufaro
150 East 58th Street
New York, New York 10155
(212) 486-1717

ROBERT ELLIS
Attorney for Petitioner
Ronald Marrazzo
900 Third Avenue
New York, New York 10022
(212) 593-3440

STEVEN ALAN REISS
Of Counsel and on the Petition

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of , One Thousand Nine Hundred and Eighty- .

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE,
HON. GEORGE C. PRATT,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

DOMINIC TUFARO, a/k/a "Donnie Boy Clouseau,"
RONALD MARRAZZO, a/k/a "Ronald Martin,"
FREDERICK SINDONA, a/k/a "Freddy" and
WILLIAM CASTALDI, a/k/a "Willy,"
Defendants-Appellants.

Filed Mar. 5, 1985

ORDER
84-1158, 84-1166, 84-1171, 84-1184

These are appeals from judgments of conviction entered in the United States District Court for the Southern District of New York (Knapp, J.) on May 1, 1984 and May 14, 1984. At the conclusion of an eight-week trial, a jury found appellants Dominic Tufaro, Ronald Marrazzo, Frederick Sindona and William Castaldi, guilty of conspiring to distribute and possess with intent to distribute heroin. 21 U.S.C. § 846. In addition, Tufaro and Marrazzo were found guilty of distributing and possessing with intent to distribute heroin and conspiring to invest and reinvest proceeds of their joint criminal activities in a racketeering enterprise. 21 U.S.C. § 841, 18 U.S.C. § 1962(d). The jury also found Tufaro guilty of organizing, supervising and managing a continuing criminal enterprise in narcotics. 21 U.S.C. § 848.

Appellants contend that the district court erred in denying their pretrial motions to suppress evidence secured by means of court-authorized wiretaps. They premise this argument on alleged deficiencies in the Government's application for the first wiretap order issued by District Judge Mark Costantino, which authorized the tapping of the telephone of one-time defendant Frank Pasqua, Jr., who pled guilty before trial. Because subsequent electronic surveillance orders were based primarily on information obtained through the Pasqua wiretap, appellants assert that all the evidence obtained against them through electronic eavesdropping was tainted by the allegedly deficient Pasqua tap and should have been suppressed. This contention is without merit.

The Government submitted the affidavit of Special F.B.I. Agent Robert J. Liberatore in support of its application for the Pasqua wiretap. The affidavit set forth information provided by three confidential informants, identified as Sources A, B and C. Source B, the most informative source, had dealt with appellants for a period of two years, during which time he learned that Tufaro and Marrazzo operated a large scale heroin distribution organization. According to the affidavit, Pasqua "had told Source B that his work for Dominic Tufaro and Ronald Marrazzo include[d] receiving quantities of heroin from Tufaro and/or Marrazzo, delivering the heroin to distributors in Manhattan, Brooklyn and Queens, and returning to Tufaro and Marrazzo the proceeds which he pick[ed] up from the heroin distributors." The affidavit stated further that Pasqua often used his telephone to relay messages to Tufaro and Marrazzo and to arrange narcotics transactions and that Source B, himself, had discussed Pasqua's narcotics business with him over the telephone on several occasions, during one of which an F.B.I. agent was present. The affidavit also disclosed that the telephone records of Pasqua's local and long distance calls reflected a pattern of calls to a telephone located at an apartment in Scarsdale, New York where Marrazzo received mail.

When the Pasqua wiretap application is viewed in a "practical, nontechnical" fashion, *Illinois v. Gates,* 103 S.Ct. 2317, 2328 (1983); *United States v. Travisano,* 724 F.2d 341, 346 (2d Cir. 1983), there can be no doubt that Source B's information provided Judge Costantino with a substantial basis for concluding that narcotics offenses had been and were being committed by the defendants and that information concerning such offenses would be obtained through a wiretap of Pasqua's telephone. *Illinois v. Gates, supra,* 103 S.Ct. at 2331. Although the Liberatore affidavit contained a somewhat general description of Source B's track record of reliability, this was not fatal to the Government's application. The affidavit contained other indicia of Source B's reliability, *id.* at 2329, and an informant's past record of reliability is not "an independent requirement[] to be rigidly exacted in every case," *id.* at 2327-28.

Appellants also contend that the Government's application for the Pasqua wiretap was deficient because the Liberatore affidavit failed to establish that normal investigative techniques, short of electronic surveillance, had failed or were unlikely to succeed. We disagree. "An affidavit describing the standard techniques that have been tried and facts demonstrating why they are no longer effective is sufficient to support an eavesdropping order even if every other possible means of investigation has not been exhausted." *United States v. Terry,* 702 F.2d 299, 310 (2d Cir.), *cert. denied,* 104 S.Ct. 482 (1983); *see United States v. Vazquez,* 605 F.2d 1269, 1282 (2d Cir.

1979), *cert. denied,* 444 U.S. 981, 1019 (1980); *United States v. Hinton,* 543 F.2d 1002, 1011 (2d Cir.), *cert. denied,* 429 U.S. 980 (1976). The Liberatore affidavit adequately informed Judge Costantino of the difficulties inherent in the use of normal law enforcement methods.

The district court did not err in denying appellants' requests for a *Franks* hearing on alleged misstatements and omissions in the Pasqua wiretap application. *See Franks v. Delaware,* 438 U.S. 154 (1978). Under *Franks,* a hearing is required only where a defendant makes a "substantial preliminary showing" that the affidavit contains inaccuracies resulting from the affiant's "deliberate falsehood or . . . reckless disregard of the truth." *Id.* at 170-71. Moreover, a *Franks* hearing is appropriate only "if the allegedly false statement is necessary to the finding of probable cause." *Id.* at 156; *see United States v. Marin-Buitrago,* 734 F.2d 889, 895 (2d Cir. 1984). It is clear from the record that Agent Liberatore did not deliberately lie or recklessly misrepresent the truth in his affidavit and that any misstatement or omission that arguably might have existed was not material to Judge Costantino's finding of probable cause.

There is no merit in appellant Tufaro's challenge of his conviction for organizing, supervising and managing a continuing criminal enterprise in narcotics. 21 U.S.C. § 848. Violations of § 843(b) can constitute predicates for a section 848 charge. *United States v. Webster,* 639 F.2d 174, 181 (4th Cir. 1981), *modified on other grounds,* 669 F.2d 185 (4th Cir.), *cert. denied,* 454 U.S. 857 (1982). This is so even though such violations are not charged separately in the indictment if, as was the case here, the indictment gave the defendant ample notice of the charges against him. *United States v. Sperling,* 506 F.2d 1323, 1344 (2d Cir. 1974), *cert. denied,* 420 U.S. 962 (1975); *see also United States v. Martinez-Torres,* 556 F.Supp. 1255, 1271-72 (S.D.N.Y.), *aff'd on other grounds sub nom., United States v. Calvente,* 722 F.2d 1019 (2d Cir. 1983). Tufaro suffered no prejudice from the prosecutor's submission to the jury of a list containing several predicate offenses that were not charged in the indictment.

The district court did not plainly err in failing to instruct the jury that its verdict had to be unanimous with respect to the identities of the five or more persons supervised by Tufaro. *United States v. Raffone,* 693 F.2d 1343, 1347-48 (11th Cir. 1982), *cert. denied,* 103 S.Ct. 2084 (1983). It did not err at all in admitting the declarations of co-conspirators against Sindona and Castaldi. Independent nonhearsay evidence established "a likelihood of an illicit association" between the declarants and Sindona and Castaldi, *United States v. Cicale,* 691 F.2d 95, 103 (2d Cir. 1982), *cert. denied,* 103 S.Ct. 1771 (1983), and the declarations of the co-conspirators were made in the course of, and in furtherance of, the conspiracy, *United States v. Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970).

Although appellants assert numerous other grounds for reversal, we feel no need to address them herein. Suffice it to say that we have reviewed them carefully and found them to be either without support in the law or without support in the record.

Although we affirm all the judgments of conviction, we believe that Tufaro should not have been sentenced on both the conspiracy and continuing criminal enterprise counts. *See United States v. Mourad,* 729 F.2d 195, 202-03 (2d Cir. 1984). We therefore vacate Tufaro's sentence--but not his conviction--on the section 846 conspiracy charged in Count One.

All convictions are affirmed. Tufaro's sentence under 21 U.S.C. §846 is vacated. The mandate shall issue forthwith.

/s/ ____________________________
Hon. Ellsworth A. Van Graafeiland

/s/ ____________________________
Hon. Lawrence W. Pierce

/s/ ____________________________
Hon. George C. Pratt

N.B. *Since this statement does* ***not*** *constitute a formal opinion of this court and is not uniformly available to all parties, it shall* ***not*** *be reported, cited or otherwise used in unrelated cases before this or any other court.*

Appendix B
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 22nd day of April one thousand nine hundred and eighty-five.

UNITED STATES OF AMERICA,
Appellee,

v.

DOMINIC TUFARO, a/k/a "Donnie Boy Clouseau,"
RONALD MARRAZZO, a/k/a "Ronald Martin,"
FREDERICK SINDONA, a/k/a "Freddy," and
WILLIAM CASTALDI, a/k/a "Willy,"
Defendants-Appellants.

Filed
Apr. 22, 1985

ORDER
84-1158, 84-1166, 84-1171, 84-1184

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants Dominic Tufaro and Ronald Marrazzo.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ________________________
Elaine B. Goldsmith
Clerk

Appendix C
Decision of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

DOMINIC TUFARO, etc., et al.,
Defendants.

MEMORANDUM & ORDER
S 82 CR 0838 (WK)

WHITMAN KNAPP, D. J.

INTRODUCTION

The indictment in this case contains thirteen counts and names twenty-one defendants.[1] Count One charges defendants Dominic Tufaro, Ronald Marrazzo, Frank Pasqua Jr. ("Pasqua Jr."), Frank Pasqua ("Pasqua Sr."), Nicholas Bonina, Alphonse Carmine Persico, Anthony Augello, Frederic Sindona, John Donnelly, Ronald Seifert, Guido Penosi, William Castaldi, Louis Macchiarola, Michael Carbone, Mike Pagano, and Susan Kantor with a conspiracy to distribute heroin. Count Two charges Tufaro alone with organizing a continuing criminal enterprise in violation of 21 U.S.C. § 848. Counts Three through Five, which allege distribution of heroin and possession of heroin with intent to distribute, name

---

[1] The indictment, the second filed by the Government in this case, originally named twenty-two defendants. However, one Anthony Augello, died shortly after having been arraigned, and we granted the Government leave to file a *nolle prosequi* as to him on May 20, 1983.

Augello, Donnelly, Seifert, Persico, and Sindona. Counts Six through Eight also allege such possession and distribution, Count Six naming Tufaro, Marrazzo, Pasqua Jr. and Pasqua Sr.; Count Seven adds Macchiarola and Carbone to this list, and Count Eight names Bonina in addition to the four defendants named in Count Six. A final distribution and possession count, Count Nine, names Bonina alone. Counts Ten and Eleven, which allege a gambling conspiracy and participation in an illegal gambling business respectively, name Pasqua Jr., Pasqua Sr., Gabriel Letizia, Rosemary Pasqua, Frank Torrioni, William Cilenti, John Doe "Al", and Joseph Wilson. Count Twelve, a RICO count, has three parts. Part (a) charges Tufaro, Marrazzo, Pasqua Jr. and Pasqua Sr. with participation in a conspiracy to distribute heroin, and with distribution of heroin. Part (b)(i) charges Pasqua Jr. and Pasqua Sr. with participation in a gambling conspiracy; (b)(ii) alleges that Tufaro, Marrazzo, Pasqua Jr. and Pasqua Sr. "laundered the proceeds from their narcotics activity in a gambling operation." Part (c), which concerns the distribution of these proceeds, also names these last four defendants. Finally, Count Thirteen charges Marrazzo, Pasqua Jr., Pasqua Sr., Kantor, and Pagano with harboring a fugitive.

We deal in this opinion with the numerous pretrial motions made by various of the defendants.

CHALLENGES TO ELECTRONIC SURVEILLANCE

It is undisputed that a great part of the Government's evidence in this case stems, either directly or derivatively, from electronic surveillance of the telephone of Pasqua Jr. and Rosemary Pasqua. The application for this wiretap, supported by the affidavit of September 15, 1982 of Special Agent Robert Liberatore of the Federal Bureau of Investigation ("Liberatore affidavit"), was presented to Judge Costantino of the Eastern District of

New York, who on September 15, 1982 ordered the surveillance. As a result of evidence obtained from this wiretap, the Government applied for and was granted orders extending this wiretap, authorizing a wiretap on defendant Marrazzo's telephone and a "bug" in his apartment.[2]

Probable Cause

Defendants contend that the order for the initial Pasqua wiretap was not supported by probable cause. The Supreme Court has recently enunciated the standard to be used in assessing challenges to probable cause:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis . . . for conclud[ing] that probable cause existed."

Illinois v. Gates (1983) __ U.S. __, 103 S.Ct. 2317, 2332.[3] This "totality of the circumstances" test directs that, where an application is based on information provided by an informant, we must consider the informant's reliability, veracity, and the basis of his or her knowledge, without giving undue weight to or requiring that specific standards be met as to any one of these factors. We find that, applying this test to the application before us, the wiretap order was supported by a showing of probable cause.

---

[2] This telephone, like the apartment in which it was located, was listed in the name of Susan Kantor. However, it is undisputed that the apartment was occupied not by Kantor but by Marrazzo. The apartment is therefore referred to as "Marrazzo's apartment" and the telephone as "Marrazzo's telephone."

[3] *Gates,* of course, dealt with probable cause for an arrest warrant and not, as here, for a wiretap application. However, it is well settled that the standards of probable cause are the same for these — and other — kinds of applications. *United States v. Fury* (2d Cir. 1978) 554 F.2d 522, 530, *cert. denied,* 436 U.S. 931.

In reviewing the decision of the issuing judge we may, of course, consider only the evidence which was actually before him. *Aguilar v. Texas* (1964) 378 U.S. 108, 109 n.1. We must also bear in mind precisely what the Government had to demonstrate by this evidence: namely, the involvement in narcotics activity of Pasqua Jr., whose phone was to be the subject of the tap. We therefore turn to the affidavit of Agent Liberatore.

We note first that Agent Liberatore does not purport to have any first-hand knowledge of any narcotics-related activities on the part of Pasqua Jr., or any other defendant, but rather relates information obtained from other FBI and Drug Enforcement Agency ("DEA") agents and three unnamed confidential informants, "Source A", "Source B" and "Source C." The Liberatore affidavit provides the following information as to these informants:

> Source A has been a confidential informant for the Federal Bureau of Investigation for a period in excess of three years, and during this time, his information has been proven to be reliable, and has been verified through other sources and independent investigation. Source A has been responsible for two arrests, one conviction and seizure of stolen property with a value in excess of $10,000. Para. 1.[4]
>
> Source B's reliability has been previously established through corroboration of information he provided concerning criminal activity and has been established in connection with this investigation through independent information, to the

---

[4] Paragraph references, unless otherwise stated, refer to the Liberatore Affidavit of September 15, 1982.

> effect that Source B has met and talked with several of the individuals identified in paragraph 2 [of the affidavit] on many occasions over the past 2 years. Para 4.
>
> Source C is a convicted narcotics distributor, currently on federal parole, who has been providing information to Special Agents of the DEA in the period from approximately September, 1981 through the present. Para. 19.

All parties are agreed that the information most crucial to the affidavit is that provided by Source B, who alone provides any direct information about Pasqua Jr. This information, as stated in the affidavit, is here reproduced:

> 5. Since May 1982, Source B has told Special Agent Schiliro that in the course of . . . conversations with ["several" of Tufaro, Macchiarola, Frank Ferraro, "Patsy Pontiac"] he has learned that Dominic Tufaro, together with RONALD MARRAZZO, operates a very large scale heroin distribution organization, in which FRANK PASQUA JR. assists them. Source B also related that Dominic Tufaro and RONALD MARRAZZO are both fugitives, and that they work together in their narcotics business as partner.
>
> * * *
>
> 7. In several conversations over the past seven months and as recently as the week of August 1, 1982, FRANK PASQUA, JR. told Source B that his work for Dominic Tufaro and RONALD MARRAZZO includes receiving quantities of heroin from Tufaro and/or MARRAZZO, delivering the heroin to distributors in Manhattan, Brooklyn and Queens, and returning to Tufaro and Marrazzo the proceeds which he picks up from the heroin distributors.

8. Since May 1982, Source B has told Special Agent Schiliro that one of the members of Tufaro and MARRAZZO's business explained that because Tufaro and MARRAZZO are fugitives, they are extremely cautious about meeting anyone they don't know and trust or going places where they might be observed or recognized. Thus, Source B said that FRANK PASQUA, JR. serves as an intermediary for both Tufaro and MARRAZZO in their narcotics distribution business and, in this connection, uses his telephone (212) 442-1245 to relay messages and arrange narcotics transactions.

9. Since May 1982, Source B has told Special Agent Schiliro that in conversation with one of the participants in Tufaro's narcotics operation during the past year he has been told that Tufaro and MARRAZZO have a number of heroin customers, including John Donnelly and Ronald Seifert, whom they supply with kilogram quantities of heroin.

10. Since June 1982, Source B has related that during the past 60 days he has been in regular telephone contact with PASQUA over telephone number (212) 442-1245 at his home at 153 Jackson Avenue, Staten Island, New York. During several of these conversations, Pasqua has discussed with Source B PASQUA's ongoing narcotics business.

11. During the week of July 18, 1982, Source B spoke to FRANK PASQUA, JR. on telephone number (212) 442-1245. They discussed problems PASQUA has encountered with one of the group's distributors, and the supply of heroin to a location in Manhattan.

Additionally, Agent Liberatore states that FBI Special Agent Leahy "observed" Source B place a phone call to Pasqua Jr.'s number and "overheard [Source B] discuss narcotics distribution," which conversation Source B subsequently asserted to Leahy had taken place with Pasqua Jr. Para. 12. Finally, Liberatore states that his own research indicated that regular calls were placed from Pasqua Jr.'s phone to a phone located at an address where Marrazzo received mail.[5]

Confirmation of certain details of Source B's information, although not of any information directly concerning Pasqua Jr., is provided through the two other informants. Source A confirms that Tufaro was involved in a large-scale heroin operation up until 1975, the last date on which the two were in "personal contact." He also confirms that Tufaro has been a fugitive since that time. Para. 2. Tufaro's prior conviction for distribution of heroin and his fugitive status since 1975 are further confirmed by Agent Liberatore. Para. 6. Source A further states that he has been informed "over the past eight years," by unnamed associates of Tufaro's, that Tufaro continues to control a large-scale distribution network through "several closely trusted individuals," refusing to deal with anyone else. Para. 3. Source C was directly involved, along with an undercover agent, in buying narcotics from two named individuals whom Source B identifies as customers of Tufaro's and Marrazzo's.

---

[5] Defendants appear to attempt to negate the implications of these calls by the argument that although the telephone was registered in the name of defendant Kantor, Marrazzo's paramour, in whose name the apartment in which the phone was located was leased, and "although Marrazzo was shown to be living at [the same address], Liberatore's affidavit conspicuously glossed over the issue of whether Marrazzo was living in Kantor's apartment." Memorandum of defendants Tufaro, Marrazzo and Pasqua Jr. ("Main Memorandum") at 44. Marrazzo has conceded in his personal motions that he was indeed living in the apartment in which the telephone was located, and we see no reason why this could not or should not have been assumed from the affidavit.

Before proceeding to apply the *Gates* analysis to this information, we make a few observations as to the general standard to be applied by a court reviewing a magistrate's -- or, as here, another judge's -- finding of probable cause. As the Supreme Court recently reiterated in *Gates,* "'[a] grudging or negative attitude by reviewing courts toward warrants.' . . . is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant," 103 S.Ct. at 2331, *quoting United States v. Ventresca* (1965) 380 U.S. 102, 108. We may thus, as *Gates* reminds us, not engage in a *de novo* review or apply overly rigorous standards of proof to a finding of probable cause. Rather, we are bound to consider the order as having a presumption of validity, *United States v. Londano* (2d Cir. 1977), 553 F.2d 805, 810; *United States v. Fury* (2d Cir. 1978) 554 F.2d 522, 530, *cert. denied,* 436 U.S. 931; and give "great deference," *Spinelli v. United States* (1969) 393 U.S. 410, 419, to the determination of the issuing judge. If he had a "substantial basis" for determining that probable cause existed --which analysis we must perform in the same commonsense, non-technical manner as the issuing judge applied to his own determination -- we may ask no more.

We agree with defendants that Source B's information is not of the type found so powerful in *Gates, supra,* or *Draper v. United States* (1959) 358 U.S. 307, in which informants provided "details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." *Gates, supra,* 103 S.Ct. at 2335. The informants in these cases had provided specific descriptions of the suspects' *modus operandi,* point and time of departure and arrival, and even -- in *Draper* -- manner of dress and walk. While the Government has contended that Source B has provided similarly specific information as to Pasqua Jr.'s *modus operandi,* we cannot agree that the use of a telephone by a suspected narcotics trafficker is analogous to the elaborate scheme of traveling and transporting drugs employed by the defendants in *Gates.*

However, the fact that Source B does not provide such miniscule details about Pasqua Jr.'s alleged illegal activities does not, as defendants imply, vitiate the valuable information which he does supply. Source B makes specific allegations as to certain individuals whom he names as Pasqua Jr.'s "bosses" and customers, thus sketching the outlines of the purported narcotics operation. Further, and more important, he relates evidence gathered from his observations of and conversations with Pasqua Jr. as to Pasqua Jr.'s activity in narcotics trafficking. Much of this information is attributed to specific telephone calls between Source B and Pasqua Jr. which occurred during specified periods of time (although we note that the precise dates of these calls is not given, presumably to avoid facilitating the defendants' recognition of Source B). The fact that this information is attributed to specific sources, chief among which is the defendant himself, lends to Source B's information a support glaringly absent from *Gates,* where the informant's "letter gives absolutely no indication of the basis for the writer's predictions regarding the [defendants'] criminal activities." 103 S.Ct. at 2326. *See also In re Grand Jury Proceedings* (8th Cir. Aug. 26, 1983) Slip. op. #83-1106.

Nor, indeed, need evidence be as detailed as that in *Gates* to warrant judicial approval. Indeed, the evidence of illegal activity here is far more direct and significant than the evidence on which the court upheld a search warrant in *United States v. Perry* (2d Cir. 1981) 643 F.2d 38, *cert. denied*, 454 U.S. 835. In that case, the affidavit supporting the warrant described three-year-old evidence of narcotics trafficking and current evidence of surveillance precautions at the suspect's house:

> automobiles (the usual Rolls Royces and Mercedes Benzes) linked to trafficking in the driveway or speeding away upon sight of the officers; and a statement by [the suspect's wife] that "[t]he Police know what Leroy is doing at the house, he pays a

> lot of people, he conducts his business out of the house every afternoon." She further stated to the officer that Butler did not live at the house and that he just came there every day to conduct his business.

543 F.2d at 50.

The value of even the more general assertions made by Source B is demonstrated by its direct and persuasive corroboration by Agent Leahy's observation of a narcotics-related telephone call to Pasqua Jr. We reject defendants' contention that this corroboration is worthless because Agent Leahy did not hear the other side of the conservation and thus had no way to confirm his statement that Pasqua Jr. — or indeed anyone — was on the other end of the telephone. This argument, we think, is conceivable but not reasonable. Affidavits in support of warrant applications are to be reviewed, not by scrutinizing every possible implication, twist or turn of the language and evidence presented, but "in a commonsense and realistic fashion," *United States v. Ventresca, supra,* 380 U.S. at 108. It is a commonsense and realistic presumption that when a call is placed to a certain telephone number, and a conservation ensues, the person to whom that number belongs is a party to the conservation. "Courts should not invalidate...warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a common sense manner." *United States v. Ventresca, supra,* 380 U.S. at 109. We see no reason why Judge Costantino should have assumed, as the defendants urge, that Leahy, who was an FBI agent and not a member of the DEA, misunderstood the subject of the conversation, or was tricked into the misconception that Pasqua Jr. was on the phone with source B; nor do we see any reason why we should now accept this far-fetched explanation.[6]

Source B's assertion that Pasqua Jr. uses his phone to conduct narcotic-related activity is further corroborated by the analysis of toll logs performed by Agent Liberatore. Although a pattern of calls to a number, even one identified with a residence where an alleged narcotics dealer and fugitive receives mail, is not in itself probative, it is highly suggestive. Indeed, in *United States v. Todisco,* (2d Cir. 1982) 667 F.2d 255, *cert. denied,* 455 U.S. 906, probable cause for a wiretap was upheld because, in part, pen registers demonstrated a pattern of calls to known narcotics dealers. While the Liberatore affidavit does not show a "close proximity in time" between these calls and "known sales" of narcotics, 667 F.2d at 258, as did the affidavit in *Todisco,* in the context of the call overheard by Leahy it lends color to Source B's general assertions of a pattern of narcotics activity. Finally, Source A's statements about Tufaro's past and present narcotics activities, although not confirmation of any of Source B's information about Pasqua Jr., serve to place Pasqua Jr. in contact with a "known narcotics dealer," a fact which we may consider in determining whether probable cause existed to believe that Pasqua Jr. was himself involved in such activity. *Perry, supra.*[7]

---

[6] Defendants further challenge this corroboration on grounds that it is described in the Liberatore affidavit merely as concerning "narcotics distribution," while Source B reports Pasqua Jr.'s descriptions of his conversations with others in slightly more detail, as for instance, stating that they involved Pasqua Jr.'s difficulties with certain dealers. From this distinction without a difference, they attempt to build a case for their proposition that the conversation in which Source B participated did not concern narcotics at all ("if there had been a blatant discussion of drugs, the affidavit would have been far more specific," Main Memorandum at 43.). Since the subject of the conversation was reported by Agent Leahy, who overheard it, we can only assume that this piece of non-logic is intended as a further challenge to his intelligence, perspicacity, veracity, or some combination thereof. As such, we find it unfounded and reject it for the reasons stated above.

We turn, finally, to the issue of the veracity or reliability of Sources A, B and C. The holding in *Gates* that this criterion need not be meticulously proven, as some previous decisions had required, is strikingly illustrated by that case's approval of a search warrant based upon information from an anonymous letter-writer as to whose veracity the issuing magistrate of necessity had no information. In light of this, we are not overly concerned by certain points in the "pedigrees" of Sources A and B, quoted above, with which the defendants take issue.[8]

We need devote little space to defendants' challenges to Source A's veracity. Although all information provided by him as to Tufaro's and Marrazzo's activities after 1975 originates from unnamed sources, his "pedigree" prior to that time is unimpeachable and is set forth in enough detail to satisfy even the most grudging review. In light of the secondary and corroborative nature of his information, we do not think that this flaw is serious enough to warrant a finding of no probable cause.

---

[7] We place no reliance on the other "corroboration" of the information about Pasqua Jr. which the Government urges upon us. Tufaro's prior convictions and fugitive status, alluded to by Source A, are no more than matters of public record available to anyone who wished to search them out. *See Gates, supra,* 103 S.Ct. at 2335. Source A provides no evidence of any connection between Pasqua Jr. and Tufaro; although he, like Source B, states that Tufaro deals with only a trusted few, Pasqua Jr. is not named. Similarly, Source C's corroboration that Donnelly and Seifert, alleged by Source B to be customers of Tufaro's and Marrazzo's, were in fact engaged in fairly high-level drug dealing might have some usefulness were this an application for a tap on the phone of one of these men; however, in the absence of a link between them and Pasqua Jr., they have no bearing on Pasqua Jr. other than to place him in the company of other suspected or known drug dealers. Corroboration of such a link between these men is nowhere present in the affidavit; nor may we consider, as the Government urges, information about such a link obtained *after* the warrant was issued.

[8] Defendants do not challenge the veracity of Source C.

Nor are we overly concerned that Source B's credentials are not presented in as much detail as Source A's. Contrary to defendants' assertion, it is not necessary that the affidavit state the number of arrests or convictions with which an informant can be credited. It is, of course, undeniable that Source B's "pedigree" is quite generally stated. Indeed, we cannot help but find it vague as to the establishment of his reliability in connection with the investigation in this case, since it does not even specify whether the individuals as to whom there is "independent evidence" that Source B "has met and talked" are defendants in this case. However, the description of his reliability is nonetheless sufficiently specific to withstand the defendants' challenge. Indeed, it is more specific than that approved by the Court in *United States v. Martinez-Torres* (S.D.N.Y. 1982) 556 F.Supp. 1236. In that case, the affidavit stated merely that the informant's "reliability has been established previously and has been established by the investigation conducted in this case." 556 F.Supp. at 1249. The court held that this statement, "even if inadequate by itself to satisfy the veracity [test], is corroborated by independent DEA investigative efforts." In that case, which involved narcotics and firearms violations, the following corroboration was found sufficient:

> [W]hen agents approached the two men who had just left Apartment 5B, "two (2) handguns were thrown out of the vehicle they had entered after they left Apartment 5B." Not only does this incriminating corroboration suggest efforts at concealing criminal activity, but it also lends some direct support for the informant's earlier statement that Apartment 5B was used as a storage of weapons.

Id.

We find that the corroboration provided by Source B's overheard telephone call is at least as suggestive, if not probative, of alleged criminal activity as the above. Agent Leahy's statement directly corroborates the veracity of both levels of Source B's claims: first, that Pasqua Jr. was involved in narcotics distribution; and second, that Source B was in possession of this information because Pasqua Jr. was in the habit of discussing it with him over the telephone. We are also mindful of the "consistently recognized . . . value of corroboration of details of an informant's tip by independent police work," *Gates, supra,* 103 S.Ct. at 2334. Here the various agents corroborated not only Source B's general allegation as to Pasqua Jr.'s involvement in narcotics trafficking, but also as to his connections and frequent telephonic communications with various narcotics dealers and fugitives.

As the Supreme Court said in *Gates,*

> the informant's "veracity" or "reliability" and his "basis of knowledge" . . . are better understood as relevant considerations in the totality of the circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.

103 S.Ct. at 2329. *See also United States v. Peyko* (2d Cir. Sept. 14, 1983) Slip Op. #82-1319.

Thus, the fact that none of the informants made any specific predictions as to the defendants' behavior, or gave detailed descriptions of their narcotics activity -- which, we repeat, does not in any event vitiate their tips -- is more than adequately compensated for here by their established histories of veracity and by the corroboration of their information both by "independent police work" and by each other. *See United States v. Vazquez* (2d Cir. 1979) 605 F.2d 1269, 1281, *cert. denied,* 444 U.S. 981. Considered as a whole, the evidence before Judge

Costantino was thus enough to demonstrate "something more substantial than a casual rumor circulating in the underworld or an accusation based on an individual's reputation." *Spinelli, supra,* 393 U.S. at 416. No more is or ever has been required.

Franks Hearing

Defendants further contend that, even if the Liberatore affidavit justified Judge Costantino in ordering the use of electronic surveillance, it contained mistakes which, if corrected, would no longer support a finding of probable cause. They request the remedy mandated by the Supreme Court in *Franks v. Delaware* (1978) 438 U.S. 154, 155-156:

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Most of the defendants' challenges to the Liberatore affidavit stem from their assumption that "Source B," who as we have said is unnamed in the affidavit, is in reality one Dennis Mulligan, an acquaintance of Tufaro, Marrazzo, and Pasqua Jr. Since the Government has not directly controverted this hypothesis,[9] we must accept it as true for purposes of this motion.[10]

Assuming, then, that Source B is Dennis Mulligan, we must agree with defendants that the Liberatore affidavit failed to mention two circumstances relative to his credibility. First, Dennis Mulligan was previously convicted of perjury.[11] Second, Mulligan was dropped from an indictment[12] in May, 1982, approximately the same time that, according to defendants' hypothesis, he became active as "Source B."

As a threshhold matter, the remedy of a *Franks* hearing applies when the Government's affidavit omits a material fact, as well as when it contains material misrepresentations. *United States v. Shakur* (S.D.N.Y. 1983) 560 F.Supp. 318, 328; *United States v. Dorfman* (N.D.Ill. 1982) 542 F.Supp. 345; *United States v. Vazquez, supra,* 605 F.2d at 1282. To do otherwise "cannot be squared with *Franks*' demand that the Government not frustrate the magistrate's review of probable cause by deliberately or recklessly providing misleading information." *United States v. Dorfman, supra,* 542 F.Supp. at 367.

---

[9] Agent Liberatore states in his affidavit of June 13, 1983, submitted in opposition to this motion, "until I read papers filed by defendants in this case, I had never heard the name Dennis Mulligan." Para. 5. Since Liberatore had no direct contact with Source B and thus need not have known his name at all, we consider this carefully worded statement somewhat less than a direct denial. We note especially the Government did not take exception to our statement to this effect at oral argument, nor to our acceptance, for purposes of this motion, of defendants' hypothesis as to Source B's identity.

[10] Since we make this assumption, we see no purpose in a disclosure of Source B's identity by the Government, and defendant's motion to that effect is accordingly denied.

[11] *United States v. Mulligan* (2d Cir. 1978) 573 F.2d 775, *cert. denied,* 439 U.S. 827.

[12] *United States v. Napolitano* (S.D.N.Y.) 82 CR 803 (RWS).

There is no merit in any of the Government's arguments that there omissions were not at least reckless. We have no reason to disbelieve Agent Liberatore's claim that he had "never heard the name Dennis Mulligan" prior to the defendants' submission of these motions, Liberatore affidavit of June 13, 1983 at Para. 5 -- and thus, presumably, that he had never heard of the above facts about Mulligan and would not have noticed their omission from an affidavit. However, this gets the Government nowhere. What Liberatore may not have known was obviously within the knowledge of the agent who, under Liberatore's supervision, was responsible for Source B's activities; and -- as *Franks* makes clear, 438 U.S. at 163-164 n.6 -- it was Liberatore's obligation to ascertain and present to the issuing judge all facts concerning the informant's reliability that may have been within the knowledge of agents acting under his supervision.

We thus pass to the question of whether "the affidavit would have been insufficient to establish probable cause if the omitted material were included." *United States v. Balistrieri* (E.D.Wisc. 1982) 551 F.Supp. 275, 278. In this we are essentially faced with a question of first impression. *Gates* removed a great deal of the emphasis which prior cases, stemming from *Aguilar v. Texas, supra,* had placed upon the credibility of an informant. In *Gates*, however, the Court was faced with an anonymous informant about whom nothing, either good or bad, was known. We, on the other hand, must decide what effect upon the "totality of the circumstances" must result from information detrimental to an informant's established credibility. While we do not by any means condone the omission, in whatever way or for whatever reasons made, we find that the particular facts omitted, considered in detail and in context, are not so grave as to affect probable cause.[13]

In appraising the importance of the omissions, we must take into account that, on the facts already disclosed to him, Judge Costantino must have assumed Source B to be a cooperating individual hoping to gain governmental favor as a result of his cooperation. Such an individual, by hypothesis, is one who has committed a crime or crimes carrying with it or them sentencing consequences of sufficient gravity to make cooperation worthwhile.[14] What new light would be shed upon such an individual's "reliability" by the information withheld here?

In the first place Judge Costantino would have been advised that the prosecution for one of the individual's criminal activities had actually proceeded to the point of indictment before any cooperation understanding had been reached. We fail to see any significance in this time sequence. Secondly, he would have learned that the individual had been convicted of "perjury." However, a full disclosure of the pertinent facts would have revealed that this perjury was committed in a grand jury investigation in which the individual was a target and in the course of which -- in unsucessfully protesting his innocence -- he had denied making a certain telephone call of less than two minutes' duration to an alleged co-conspirator. This denial came into unhappy conflict with the telephone company's long-distance records, but there was no indication of the content of the call or whether or not it had any criminal significance. Certainly, this information could not rationally cause a judge to question information given by an otherwise reliable informant such as Source B.

---

[13] We note that we have been little helped in this investigation by the Government, whose 146-page brief in opposition to defendants' motions devotes a scant two pages to the *Franks* issue, and not one word to the issue of these omissions, which subject it appears to have overlooked entirely.

[14] The fact that "we entertain some doubt as to an informant's motives" does not, of course, vitiate his information. *Gates, supra,* 103 S.Ct. at 2329.

We need devote less time to defendants' other allegations of misstatements. The Liberatore affidavit states "[d]uring the week of July 18, 1982, Source B spoke to FRANK PASQUA, JR. on telephone number (212) 442-1245. They discussed problems PASQUA has encountered with one of the group's distributors, and the supply of heroin to a location in Manhattan." Para. F(11). Pasqua Jr. asserts that the only phone call to which this could possibly refer was with Dennis Mulligan, but that the content of the call is misrepresented by the affidavit. At oral argument, counsel for Tufaro, who presented this motion, candidly admitted that this allegation might be "a little too self-serving to pass muster with the Court" and hence might provide insufficient grounds, on its own, for a *Franks* hearing. Tr. at 95. We agree that this does not amount to the "substantial preliminary showing" required by *Franks.* As the court there explained,

> [to] mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

438 U.S. at 171.

Defendants further claim that the Liberatore affidavit misrepresents the relationship of Source B to Tufaro and Marrazzo in the following two paragraphs:

> 38. Likewise, the use of undercover agents and informants can only provide limited information concerning PASQUA's criminal business. Thus, the undercover investigation of John Donnelly has not revealed the full scope of the narcotics relationship between Donnelly and "Carmine" Persico, nor provided information or evidence linking them to Tufaro and MARRAZZO. It is also clear that Donnelly is unwilling to involve himself to any further extent in any undercover sales in the future. Similarly, Tufaro and MARRAZZO have indicated that they will not meet anyone whom they do not know.
>
> 39. Additionally, Source B although aware of PASQUA's narcotics business, is not in a position to obtain additional, direct information or evidence because his relationship with PASQUA [sic], and any direct approach (or introduction of an undercover agent) would be considered very suspicious. Even if successful, however, such an approach would be unlikely to reveal the full scope of PASQUA's narcotics business, including his relationship with Tufaro, MARRAZZO and others, since Tufaro and MARRAZZO would most likely refuse to deal directly with anyone except PASQUA.

In substance, defendants insist that we must infer from these paragraphs that Source B lacks access to defendants Tufaro and Marrazzo, while both of these defendants have asserted in their affidavits in support of his motion that they in fact knew Mulligan well and saw him fairly often. However, we merely find these paragraphs to be obscure, and not false, on this issue. We find no substantial preliminary showing as to defendants' allegation of misrepresentation, especially in light of the fact that neither Tufaro nor Marrazzo challenges Liberatore's ultimate conclusion that Source B could not obtain direct information or evidence of the defendants' narcotics activity.

Furthermore, even were we to find that a substantial preliminary showing had been made as to the existence of a misrepresentation regarding Source B's relationship to Tufaro and Marrazzo, such a misrepresentation would not warrant a *Franks* hearing, since such a hearing is appropriate only "if the allegedly false statement is necessary to the finding of probable cause." *Franks, supra,* at 156; *see United States v. DePoli* (2d Cir. 1980) 628 F.2d 779, 785. The facts allegedly misrepresented here have no bearing on our finding of probable cause, but are relevant only to our consideration, discussed below, of whether the Government exhausted all alternative investigative means before requesting permission to conduct electronic surveillance.[15]

We further reject defendants' contention that any misrepresentation as to this issue "proves" that Liberatore, and not Source B, is responsible for any other alleged misrepresentation in the affidavit. "The deliberate falsity or reckless disregard whose impeachment is permitted [in a *Franks* hearing] is only that of the affiant, not of any nongovernmental informant." *Franks, supra,* 438 U.S. at 171. Defendants' attempt at bootstrapping, for which they have presented more convoluted conjecture than evidence, does not make their contention any less self-serving, nor does it fill the gap in the proof of a material omission or misstatement.

---

[15] Indeed, evidence of a close relationship between Source B and Tufaro or Marrazzo might well strengthen the affidavit's showing of probable cause, since it would indicate that Source B's information came from first-hand contact with the alleged "kingpins" of the narcotics operations.

Finally, defendants contend that since the Government did not use Source B to obtain consensual recordings of his discussions with Pasqua, Jr., or to arrange a nacrotics purchase, it therefore must have misrepresented the closeness of Source B's relationship to Pasqua, Jr. This elastic inference stretches beyond the reach of the evidence. Nothing in the record supports defendants' supposition, and Special Agent Liberatore's affidavit of June 13, 1983 at Para. 3 definitively lays it to rest with the revelation of Source B's refusal to cooperate in any investigative method which would reveal his identity.

Alternative Investigative Procedures

Defendants further urge that all fruits of the Pasqua Jr. wiretap must be suppressed because, they contend, the Government failed to attempt all possible alternative investigative procedures and the Liberatore affidavit failed to state why such alternative measures had not been taken, in violation of 18 U.S.C. § 2518(1)(c).[16]

Perhaps, the most dramatic way to approach defendants' contention is to contrast the facts before us with those in *United States v. Lilla* (2d Cir. 1983) 699 F.2d 99, the authority upon which defendants principally rely. The defendant against whom the *Lilla* surveillance was directed was a "small-time" narcotic dealer who had sold a pound of marijuana to an undercover state trooper, and promised to be able to provide some cocaine. The undercover trooper, who made the purchase on his first introduction, was immediately given the defendant's home and business phone numbers; and the defendant gave every indication of being willing to continue the illicit relationship. As the court noted, the defendant in *Lilla* "operated more openly than most and with less care in terms of evading detection." 699 F.2d at 104. Nonetheless, rather than developing his thus-far successful investigation of the defendant, the trooper sought and received approval for wiretaps. This the court could not countenance, rejecting the Government's conclusory statements that it had fulfilled its obligation under 18 U.S.C. § 2518(1)(c).

---

[16] 18 U.S.C. §2518 states, in relevant part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> ...
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

In the case at bar, on the other hand, the objective was a sophisticated "big-time" operation, dealing in kilograms of heroin. The alleged principals -- including a fugitive from justice -- exhibited an extreme sensitivity to surveillance: as Liberatore stated, "Tufaro and Marrazzo have indicated they will not meet anyone whom they do not know." Liberatore Affidavit at Para. 38. The leaders of this operation worked on the wholesale level through surrogates: "Tufaro and Marrazzo would most likely refuse to deal directly with anyone except Pasqua." Liberatore Affidavit at Para. 39. Source C, who had made two purchases of 27 and 589 grams of heroin from one of the alleged conspirators, was given the cold shoulder and shut off from further contact once the defendant became suspicious of agents surveilling the second transaction. The agent was thus prevented from making a significantly larger third purchase of over 5 kilograms of heroin. Far from giving out their phone numbers to undercover operatives on their first encounter, the defendants here were highly secretive -- defendant Tufaro's residence was only located after his arrest, despite months of investigation.

In these circumstances, it seems wholly reasonable for Judge Costantino to have accepted Liberatore's assurance of the futility of alternative methods of investigation such as surveillance of Pasqua Jr.'s home (which was in a residential neighborhood where surveillance would in any circumstance be difficult, Liberatore affidavit at Para. 36) or the residences of Marrazzo or Tufaro, which were at that point not known. We do not agree with defendants that these assurances are similar to those provided in *United States v. Kalustian* (9th Cir. 1976) 529 F.2d 585, 587-588, on which case defendants rely. In *Kalustian*, the affiant agent simply elaborated briefly on the statement that in his experience no gambling operation could ever be cracked by less intrusive means than electronic surveillance; no mention was made of the defendants or the particular circumstances to be investigated. Here, on the other hand, Agent Liberatore did provide just such descriptions.

We find further that the Government did not fail either to make full use of Source B or to explain why he was not used to obtain further information. The crucial information with respect to Source B's relationship to the targets and his usefulness in producing evidence is set forth in Para. 39 of the Liberatore Affidavit:

> 39. Additionally, Source B although aware of PASQUA's narcotics business, is not in a position to obtain additional, direct information or evidence because his relationship with PASQUA [sic] and any direct approach (or introduction of an undercover agent) would be considered very suspicious. Even if successful, however, such an approach would be unlikely to reveal the full scope of PASQUA's narcotics business, including his relationship with Tufaro, MARRAZZO and others, since Tufaro and MARRAZZO would most likely refuse to deal directly with anyone except PASQUA.

Defendants assert, first, that this fails to explain why the Government did not gather information through

Source B by such means as a "wire" (an electronic recording device placed on Source B's person), testimony, or by having Source B either transact a deal himself or introduce an undercover agent to transact a deal with some of the defendants. Secondly, defendants assert -- on the assumption, which we have said we accept for the purposes of this motion, that Source B is Dennis Mulligan -- that Source B was in the confidence not only of Pasqua Jr. but of Marrazzo and Tufaro, a fact which the Liberatore affidavit does not mention in its recital of Source B's contacts and limitations.

We cannot agree that the first allegation is true or the second significant. While Para. 39 is unquestionably general, and even leaves incomplete a crucial sentence, its meaning is clear: Source B could get close to the principal targets of the investigation, but his closeness was limited and fell short of allowing him to obtain the sort of information which would enable the Government to discover the details and scope of the target narcotics operation. We find it irrelevant that Liberatore did not state that this relationship held true for Tufaro and Marrazzo as well as for Pasqua Jr., since his conclusion applies in any event. We note particularly that Tufaro claims only that he and Marrazzo met often with Mulligan, "spoke freely" with him, and -- in Tufaro's case -- was close enough to him to advance him money when his (unspecified) activities resulted in legal trouble. Tufaro affidavit at Para. 6.[17] Although Pasqua Jr. also appears to have spoken frequently and candidly with Source B, there is nothing to suggest that such confidences, while clearly apprising Source B of the nature and some details of the defendants' business, would admit him far enough into the inner circle to allow him to produce evidence about the full scope of the operation. While we do not reject Tufaro's contentions, we do not see that they are in any way inconsistent with such limitations. We therefore decline to find either the Government's activities or the Liberatore affidavit fatally deficient, and we deny the motion.[18]

---

[17] Marrazzo's affidavit does not broach the issue of his relationship with Source B/Mulligan, other than to describe one occasion on which he suspects Mulligan of having kept him away from his apartment in order to facilitate the planting of a bug. We note with interest, however — in light of Tufaro's representations as to their closeness — Marrazzo's statement that, in contrast to the above occasion, "[a]t every other meeting that I had with Dennis Mulligan during the preceeding two years I would stay with him for approximately 15 to 30 minutes." Marrazzo Affidavit at para. 4.

---

[18] Defendants make much of the following statement in the Liberatore Affidavit of June 13, 1983, submitted in opposition to this motion:

> 3. From the first time I learned of Source B's existence, through the present day, I have understood that he has absolutely refused to testify at a public trial or have his identity become know [sic] to the targets of his investigation, for fear of his life. Accordingly, Source B could not wear a recording device during his conversations with Pasqua [Jr.] and other members of Tufaro's narcotics organization because that would necessarily create a recording which would identify him and have to be provided to the defendants. Likewise, by introducing an undercover agent to Pasqua [Jr.]. Tufaro or other members of that group, Source B's identify [sic] would have been revealed. Therefore, the alternative techniques that defendants suggest were *not* available, just as I stated in my original affidavit.

Emphasis in original; footnote omitted.

Since this explanation was not included in the affidavit which accompanied the application for the wiretap, it cannot, of course, fulfill the requirements of 18 U.S.C. §2518(1)(c). However, we assume that this paragraph was intended as a supplementary explanation to the explanation proffered in para. 39 of the original Liberatore Affidavit, which as we have stated, we find sufficient on its own to fulfull the statute.

Challenges to Subsequent Electronic Surveillance

We need devote no further discussion to defendants' challenges to subsequent wiretap orders and extensions and orders permitting electronic eavesdropping or "bugs," insofar as these are based on defendants' claims that the September 15 Liberatore affidavit was invalid and thus tainted all subsequent orders which relied on information derived from the Pasqua wiretap. There are, however, a few additional challenges to the subsequent electronic surveillance which merit some discussion.

Defendants challenge the propriety of extending the Pasqua wiretap, which had been authorized for the purpose of intercepting narcotics-related conversations, to include gambling-related conversations as well. It is undisputed that, having heard some of these latter kind of conversations during the first week of surveillance, the Government reported them to Judge Costantino in its first seven-day report, as required by *United States v. Tortorello* (2d Cir. 1973) 480 F.2d 764, *cert. denied,* 414 U.S. 866, and immediately requested the extension. Defendants further do not seem to challenge that these first gambling conversations were properly intercepted under the "plain view" doctrine of *Tortorello, supra.* Their contention is, rather, that the extension should not have been granted because the Government failed to demonstrate that there were no alternative investigative means for discovering information about this activity. Specifically, they claim that the extension order is invalid under *United States v. Santora* (9th Cir. 1979) 600 F.2d 1317, because no "alternative investigative means" showing was made as to the persons involved in the gambling conversations who were not also involved in the narcotics conversations.

Santora, however, does not stand for the proposition that a fresh showing is required each time the Government wishes to monitor the conversation of a new suspect or set of suspects, as the defendants claim. Rather, in that case, the Government had obtained an order authorizing a tap on one suspect's telephone. It then applied for another order, for a tap on the telephone of another person whose conversations had been overheard pursuant to the original tap. In this second application, however, no showing of the impracticability of alternative investigative means was made as to the intended subject; rather, the Government simply repeated those allegations as to the subject of the first tap, on whose phone the second subject was originally heard. The court held that this did not provide for the second subject the protections envisaged by Congress in 18 U.S.C. § 2418(1)(c).

In the instant case, on the contrary, the Government did not seek to tap the telephones of the "gambling defendants," but merely to listen to their conversations about gambling on Pasqua's telephone. Defendants have provided us with no authority, and we know of none, for the proposition that in such a circumstance an additional showing need be made as to new conversants on a new subject. We are convinced that this is not the sort of protection Congress had in mind. Indeed, were we to agree with defendants, we cannot see why we would not equally be forced to hold that a fresh showing as to alternative investigative means would be necessary each time a new voice is heard on an intercepted wire. This, we think, goes against common sense.

The sole question before us thus concerns not the new suspects, but the original suspect and the new offense: that is, was the Government properly authorized to continue to listen to gambling conversations which occurred over Pasqua, Jr.'s telephone? We think the answer is clearly yes. The affidavit repeated the assertions, discussed above, as to Pasqua's alertness to surveillance, the character of his neighborhood, and the ineffectiveness of other less intrusive means of information gathering. While these are not specifically stated with respect to gambling, we find that such an explicit statement need not be made, since only common sense is necessary to discern that a subject who will become suspicious of investigative activity will not have his suspicions set to rest by the Government's own knowledge as to the precise subject of investigation. In addition, since there is no indication that Source B -- or any other informant -- had any access to information about Pasqua, Jr.'s gambling activities, the issues of introducing an agent, wearing a wire or obtaining direct testimony as to these activities would seem to be removed. We thus find that Judge Costantino properly authorized the extension of Pasqua wiretap to include gambling conversations.

Defendants further challenge certain statements made by Agent Liberatore in his affidavit of October 15, 1982, in support of the application for an extension of the wiretap order. Agent Liberatore summarized the narcotics-related conversations which had been overheard during the initial period of the interception. Of his summaries of or references to forty or more conversations, the defendants assert that four contain material misstatements sufficient to trigger a hearing under *Franks v. Delaware, supra.* We disagree.

The first conversation whose representation by Liberatore is challenged occurred on September 16, 1982, between Pasqua, Jr. and "Patty." According to Liberatore,

> "Patty" told PASQUA that he had received a call from PASQUA's "girlfriend" and that they should meet the next day, instead of Sunday, "same time and place."

Defendants challenge this summary with the contention that the conversation concerned the death of an infant relative of Pasqua, Jr. While the conversation certainly did concern this latter subject, it also contained the discussion summarized by Liberatore. Pasqua, Jr.'s statement that he might not be able to attend a meeting with the "girlfriend" the next day because the funeral might take place at that time support Liberatore's implicit conclusion that the discussion of the meeting was not merely a continuation of the discussion of the child. We thus do not think his inclusion of this conversation in his report, or his summary of it, contained any misstatement.

Defendants further challenge Liberatore's summary of a conversation held on September 22, 1983 between Pasqua, Jr. and Marrazzo: "PASQUA asked MARRAZZO if 'she got any money.' MARRAZZO said she didn't." Para. 39. This conversation, as defendants point out, is entirely about a birthday party for someone named Mary. Except for the two-line interchange described above, there is no conversation about anything related to narcotics, unless we assume a fairly elaborate "code" which the Government has not suggested. However, even assuming that this misstatement of the conversation was knowingly or recklessly made, we do not find that it is in any way material, as defendants contend, or would have any effect upon probable cause if removed from the affidavit. This statement is referred to only once in the affidavit, in the following paragraph:

> 48. Based on the conversations intercepted during the weeks of September 15 to September 29, 1982, and the meeting on September 29, 1982, I believe that PASQUA contacts TUFARO and MARRAZZO regularly over (914) 723-9166 and that PASQUA arranged for MARRAZZO and TUFARO to meet with narcotics their customers. Thus, I believe that when PASQUA relayed messages to MARRAZZO and TUFARO about meetings with "Patty" and "Freddy" he was acting as the intermediary in their narcotics business, in which MARRAZZO and TUFARO are the suppliers. Further, I believe that PASQUA collects moneys owed to MARRAZZO and TUFARO. Thus, on September 22, 1982, PASQUA and "Ronnie"

> (MARRAZZO) talked about getting "money." Similarly, I believe that when TUFARO asked PASQUA, on September 27, 1982, whether he still needed to "get my clothes out of the tailor's," since their meeting had been delayed, that inquiry was a coded reference to getting narcotics from TUFARO's stash.

As this paragraph indicates, the September 22 conversation was but one reason for Agent Liberatore's suspicions about the role played by Pasqua, Jr. Even were we to consider this paragraph without the reference to the call or to the allegation that Pasqua, Jr. acts as Tufaro's and Marrazzo's money collector, the general thrust would not be changed overmuch. There is thus no reason to hold a *Franks* hearing because of this misstatement.

We are similarly unimpressed with the other alleged misstatements in the Liberatore affidavit. Defendants quibble with Liberatore's statement that "on September 21, 1982 at 4:54 p.m. Dominic Tufaro called for Pasqua who was not home." Para. 39. The transcript shows that in reality Mrs. Pasqua, who answered the telephone, informed Tufaro that Pasqua, Jr. was downstairs, and that she would get him, at which point Tufaro told her he would leave a message instead. Finally, defendants take issue with the following paragraph:

> 40. On September 24, 1982, PASQUA received a call from "Freddy" who told PASQUA to tell his "friend" that they should meet on Tuesday (September 28, 1982) at his (Freddy's) house. That afternoon at 3:46 p.m. Mrs. PASQUA placed a call to (914) 723-9166, and spoke to DOMINIC TUFARO about a call she received from "Ronnie" (MARRAZZO) a few minutes before. TUFARO acknowledged that "Ronnie" had just called Mrs. PASQUA from that location. During that call, Mrs. PASQUA said her husband gave her the (914) 723-9166 number in case of an emergency.

Defendants assert that this paragraph is misleading because it implies that "the two calls are related when, in fact, they are not." If in fact this inference is drawn, the results are negligible. Defendants themselves admit that these "misstatements are not in themselves significant." We find, further, that there is no pattern of material misstatements which could lend them the color defendants urge, especially in the context of the numerous other calls reported in the October 15 affidavit. We therefore find that the extension of the wiretap was properly granted, and deny the motion for a *Franks* hearing on this issue.

An additional tap on Marrazzo's telephone was authorized on October 14, 1982. With respect to the application for this tap, defendant Penosi asserts that the Government failed to demonstrate that a tap on Marrazzo's phone would yield any information other than that available through the tap on Pasqua Jr.'s phone: namely, that Pasqua Jr. and Marrazzo engaged in narcotics-related conversations. The affidavit of Special Agent Thomas Bondanza of October 14, 1982, however, demonstrates more than this. From the affidavit's descriptions of the conversations which had been overheard pursuant to the Pasqua Jr. wiretap (Para. 37-48) it could be inferred that, just as Pasqua Jr. used his telephone to discuss narcotics with several people, so Marrazzo -- whose voice appears frequently in the overheard conversations -- conducted business in this manner with several people. We note especially Para. 42:

> [After receiving information as to the rescheduling of a meeting], PASQUA immediately called MARRAZZO at a restaurant on Central Avenue in White Plains, and told him of the change in plans. One half-hour later, at 9:33 p.m. PASQUA received a call from TUFARO, who had apparently spoken to MARRAZZO and who called to confirm that they were no longer meeting Freddy the next morning.

The inference that Marrazzo used his telephone to discuss narcotics with persons other than Pasqua Jr. is further confirmed by the fact that pen registers of Marrazzo's phone reflect "many calls" to two known narcotics dealers. Paras. 49-50. This is, we find, an ample showing that the wiretap was necessary to obtain certain information and not merely "an additional useful tool," *United States v. Lilla, supra,* 699 F.2d at 102.

Penosi further alleges that the applications for the various eavesdropping orders were invalid because not properly authorized. Penosi states, correctly, that the Assistant Attorney General who authorized those applications was vested with the authority to do so by Attorney General Civiletti in Order No. 931-81, dated January 19, 1981, but did not actually sign the first of the authorizations until September 14, 1982, some twenty months after Civiletti had left office. He fails to note, however, that Order No. 931-81 was explicitly reaffirmed by Order 934-81, which was signed by Attorney General Smith on February 27, 1981, and was in effect at the time the authorizations were signed. There was thus no failure in the chain of authorization.

SEVERANCE MOTIONS

Rule 8 Motions

The defendants have moved, pursuant to Federal Rule of Criminal Procedure 8(a), to sever the gambling and narcotics counts of the superseding indictment. That Rule provides that offenses may be joined in a single indictment:

> . . . if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The Government contends, and we agree, that the last-mentioned criterion is met by the presence of a RICO count in the indictment. The Second Circuit has recently held that a RICO count serves as a "sufficient nexus" to bind two different conspiracies. *United States v. Weisman* (2d Cir. 1980) 624 F.2d 1118, 1129, *cert. denied*, 449 U.S. 871 (securities fraud and bankruptcy fraud). Defendants contend, however, that while RICO may provide such a link where, as in *Weisman*, it is "central to the indictment" and where the membership of the two offenses linked by it is substantially the same, such a link is not present where only five out of twenty-two defendants are named in the RICO count and six defendants named in the gambling counts are charged with no narcotics offenses. We find this contention meritless. *Weisman* sets forth no such numerical test for determining whether the presence of a RICO count fulfills the requirements of Rule 8. Indeed, the Court specifically stated that

> The Rule specifically provides that "all of the defendants need not be charged in each count" and this language has generally been construed to permit joinder in cases where individual defendants are charged with some but not all counts of the indictment.

624 F.2d at 1129 (citations omitted). We find that the demands of Rule 8(a) are met where RICO establishes a "nexus" between the offenses, regardless of whether it specifically establishes such a connection between each defendant charged in one count and the other counts with which he or she is not charged. Here this test is clearly met, since the Government alleges that the RICO defendants used the gambling operation to "launder" the money received from the alleged narcotics business. This link between the offenses, we find, is more than enough to satisfy the demands of Rule 8(a), and joinder of the two offenses was thus proper.

We find further that joinder of the various defendants is proper under Rule 8(b), which provides:

> Two or more defendants may be charged in the same indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Joinder under this Rule is challenged by various defendants who are charged with either gambling or narcotics offenses, but not both, and who are named in the RICO counts. Their theory is that, as a result of their limited participation in the large number of offenses charged in the indictment, they are not part of the same "act or transaction" as the defendants who have been charged with offenses other than those with which they themselves are charged. However, *Wesiman* directly addressed a claim identical but for the individual offenses joined by the RICO count:

> If, as we have already concluded, the acts of bankruptcy fraud could properly be considered part of a "pattern of racketeering activity," we see no reason why they could not similarly constitute part of a "series of acts or transactions constituting an offense" within the meaning of Rule 8(b). Indeed, a construction of Rule 8(b) that required a closer relationship between transactions than that necessary to establish a "pattern of racketeering activity" under RICO might possibly prohibit joinder in circumstances where Congress clearly envisioned a single trial.

624 F.2d at 1129. Joinder was thus proper under Rule 8(b), the Court held in the paragraph quoted above, even where a defendant was charged with participation in one of the two sorts of illegal activities joined by a RICO

count, but not with the other activity or the RICO count itself. As we have stated, we decline to distinguish *Weisman* on the grounds urged by the defendants.

Defendant Sindona further contends that his joinder in the narcotics conspiracy count is improper under Rule 8(b) since, he asserts, the Government has alleged not one narcotics conspiracy, as the indictment indicates, but two, in one of which he is not alleged to have participated. A reading of the substantive narcotics counts does indeed give the impression that two separate core groups of defendants were engaged in selling narcotics: one group composed of Augello, Donnelly, Seifert, Persico and Sindona (Counts Three through Five); the other composed of Tufaro, Marrazzo, Pasqua Jr., and Pasqua Sr. (Counts Six through Eight).[19] Only in the conspiracy count are any members of one group linked to any members of the other. Sindona further argues, pursuant to Rule 14, that in view of this situation, he will be prejudiced by the introduction of evidence about the "Tufaro group" and Counts Six through Eight.

We note at the outset that the Government has stated its intention to dismiss Counts Three through Five, for which venue is properly located in the Eastern District of New York. As a result, only Count One -- the conspiracy count -- will remain as to Sindona. The issue thus is not how many conspiracies the evidence will demonstrate, but whether Sindona is properly named in the conspiracy count absent any substantive counts linking him to the "Tufaro group."

We think the answer is yes. The overt acts to the conspiracy count indicate that there was indeed a connection between Sindona and the "Tufaro group." Overt acts 10, 13, 16, 22 and 65 reflect conversations on different occasions between Sindona and Pasqua Jr. On three of those occasions, the overt acts indicate that

---

[19] Count Seven, in addition to these four, lists Macchiarola and Carbone; Count Eight lists the above four and Bonina.

Pasqua Jr. spoke to Marrazzo a short time after speaking with Sindona. Thus, overt act 14 reflects a call from Pasqua Jr. to Marrazzo five minutes after a call from Sindona; overt act 17 reflects a similar call with a four hour interlude;[20] and overt act 23 reflects a call from Marrazzo one hour after Sindona and Pasqua Jr. had spoken. Nor is this connection limited to Pasqua Jr.: overt act 18 indicates that, the day after the conversations described in overt acts 16 and 17, Tufaro and Pasqua Jr. went to Sindona's home, allegedly for a meeting arranged in the previous conversations. While Sindona argues that there is no proof that he actually met with the two at that time, or indeed that he was at his home, we think the more reasonable inference from these allegations is that a meeting did indeed take place.[21]

These conections are, we think, enough to sustain a challenge under Rule 8. The absence of Sindona from any substantive narcotics counts is not decisive; Rule 8(b) specifically states, as noted above, that "all of the defendants need not be charged in each count." Sindona's above-described connections with Pasqua Jr. and Tufaro may, of course, prove at trial to be inadequate to establish his participation in a narcotics conspiracy with their "group." This, however, is a matter which is "singularly well-suited to resolution by the jury," *United States v. McGrath* (2d Cir. 1969) 613 F.2d 361, 367, *cert. denied*, 446 U.S. 967, and will better be decided on the basis of all the evidence than on the bare-bones allegations of the indictment.

---

[20] Overt act 17 does not reflect whether Pasqua Jr. called Sindona or vice versa.

[21] The Government contends, and Sindona disputes, that a recorded conversation between Tufaro and Marrazzo the day before this meeting contains references to "going to the tailor," which various FBI agents have assured us can only be a reference to narcotics transactions. Sindona also disputes the Government's assertion that in another conversation Sindona uses the term "girl friend," which we are once again informed must be given sinister connotations. Tr. at 11-12. We need not decide, however, whether such language was used or, if so, what its import might be, since defendants do not appear to deny that Sindona knew of arrangements for a meeting at his house, nor that the other participants in the meeting did arrive at his house at the appointed time.

Rule 14 Motions

Letizia, Rosemary Pasqua

Although we find, as stated above, that the gambling and narcotics counts are properly joined under Rule 8(a), we are of the opinion that two of the defendants are prejudiced by this joinder. Rule 14 provides:

> If it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may . . . grant a severance of defendants . . .

Letizia and Rosemary Pasqua have moved that we grant such severance, and we grant these motions.

Rosemary Pasqua and Letizia are each charged only with participation in a gambling conspiracy (Count Ten) and in an illegal gambling business (Count Eleven). Each claims that the massive amount of evidence of narcotics activity that will be brought out as to other defendants will result in "prejudicial spillover" preventing the jury from properly considering the charges and evidence against them.

Apart from denying that this will occur, and assuring us that such motions "have been denied time and time again," Brief at 108, the Government fails to address the claims of these individual defendants. We are, of course, aware that strong policy reasons dictate the holding of joint, rather than severed, trials. *United States v. Lyles* (2d Cir. 1979) 593 F.2d 182, *cert. denied*, 440 U.S. 972; *United States v. King* (S.D.N.Y. 1970) 49 F.R.D. 51. However, we find that the discretion which Rule 14 allows us would be nearly worthless were we not able to grant such a motion as the one before us.

There is no question that these two defendants will suffer "real" prejudice, *United States v. Kahn* (7th Cir. 1967) 381 F.2d 824, 840, *cert. denied*, 389 U.S. 1015, from the presentation of large amounts of evidence, including tapes and narcotics, totally unrelated to them. The presence of numerous other defendants, with the concomitant length of the trial that must ensue, will serve to exacerbate this problem still further, since prolonged exposure to narcotics evidence can only serve to impress upon the jury that aspect of the trial. The unique position of these two with respect to the other defendants enhances this danger still further. Of the six others named in Counts Ten and Eleven, two -- Pasqua Jr. and Pasqua Sr. -- are also named in four of the heroin counts, as well as all five subdivisions of RICO Count Twelve, while the other four have at the time of this writing not yet been apprehended (one, in fact, has not even been named ("John Doe 'Al' ")). It is thus at least possible that Rosemary Pasqua and Letizia, if not severed, would be the only defendants as to whom the evidence of narcotics trafficking would be wholly irrelevant. Finally, Rosemary Pasqua is likely to be associated with the activities of Pasqua Jr., who is named in the majority of the counts of the indictment, for no other reason than that she is his wife and shared his home during the entirety of the relevant period.

We cannot agree with the Government that the presence of a conspiracy charge against these two defendants somehow counteracts this potential for substantial prejudice. We stress that, while the RICO count links the gambling and narcotics counts in general, it does not link Rosemary Pasqua or Letizia to any narcotics activity, nor has the Government alleged that any such links will be provided at trial. Prejudice may, of course, be most apparent where a conspiracy count has been dismissed, leaving the defendants to be tried on unrelated substantive charges, as in *United States v. Branker* (2d Cir. 1968) 395 F.2d 881, upon which both sides rely. In that case, the Court said of "spillover evidence":

> This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants. The jury is subjected to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way. As trial days go by, "the mounting proof of the guilt of one is likely to affect another."

395 F.2d at 888 (citations omitted).

This analysis is made no less appropriate to the situation before us by the presence of the gambling conspiracy count in which Rosemary Pasqua and Letizia are named. Insisting upon the importance of the conspiracy charges, the Government confuses the standards of Rule 8, which determine the technical correctness of joining two or more offenses or defendants, with those of Rule 14. As the Supreme Court has emphasized in *Schaffer v. United States* (1960) 362 U.S. 511, upon which the Government relies, the presence of prejudice, and not of a conspiracy count, is the determinative factor under the latter Rule. We find that no less prejudice is found here, where the defendants' alleged acts (although by hypothesis taken in furtherance of one conspiracy) are in and of themselves unconnected to a related conspiracy, than in *Branker, supra,* where the substantive acts with which the various defendants were involved were unconnected. In short, while the existence of the RICO count links drugs and gambling, it does not remove the simple fact that Rosemary Pasqua and

Letizia, whose cases could be tried quickly and simply, will be forced to sit through a lengthy, complicated trial with potentially enormous amounts of evidence having nothing to do with them. This is, we find, a classic situation of prejudicial spillover.

We further find that this prejudice could not be cured by any action taken by us or by the Government at trial. Jury instructions, while often useful tools in obviating prejudice, are not cure-alls. Likewise, marshalling the evidence would not be likely to be truly effective where it would involve the repetition and confirmation to the jury of the large amount of evidence inapplicable to these defendants. Finally, we are not impressed by the Government's offer to redact the tapes of narcotics-related conversations on which Rosemary Pasqua's voice is heard answering the telephone or taking a message for her husband. While this would remove any direct connection between her and these damning conversations, it would do nothing about the cumulation of the narcotics-related evidence discussed above. We therefore grant the motions of Rosemary Pasqua and Letizia for severance.[22]

---

[22] Rosemary Pasqua has asserted that, in addition to being tried apart from her husband, she must be tried subsequent to his trial, since -- as she claims -- she intends to testify on her own behalf, which testimony would include descriptions of conversations between the two of them which would exculpate her but incriminate him, and which he would exercise his marital privilege to prevent her from divulging were she tried contemporaneously with or without him. While Mrs. Pasqua's papers contain an accurate discussion of the marital privilege, however, they do not assure us that these conversations are not "about crimes in which they [husband and wife] are jointly participating [and thus] not marital communications for the purpose of the marital privilege." *United States v. Mendoza* (5th Cir. 1978) 574 F.2d 1373, 1381, *cert. denied*, 439 U.S. 988, *reh. denied*, 579 F.2d 644. Since it is thus unclear to us whether or not Pasqua Jr. could in fact invoke the marital privilege were Rosemary Pasqua to testify prior to his trial, we deny this motion.

Pagano, Kantor

Pagano and Kantor are named in Count One of the indictment, the narcotics conspiracy count; and are charged, in addition, with harboring a fugitive under Count Thirteen. Both have moved for severance under Rule 14 on the grounds that their alleged roles were so peripheral or minor that they will be prejudiced by evidence as to the major figures in the indictment.

Kantor, who was Marrazzo's paramour, rented an apartment, in her name, at 555 Central Avenue, Scarsdale, New York, and leased a telephone at that location, also in her name. This apartment was inhabited by Marrazzo; although Kantor visited him there on weekends, she did not live there, did not have a key, and kept no personal items there. The Government alleges that she, along with others, "maintained and assisted in maintenance of certain locations, *i.e.*, stashes and hiding places, where narcotics, narcotics paraphernalia, and the proceeds of narcotics sales were kept and where [narcotics were processed for distribution], Count One, Para. (v); and also that she allowed Marrazzo and other defendants to borrow her car to run narcotics-related errands. Kantor is named in seven overt acts, each representing one telephone call from the apartment phone; and the Government contends that various tapes indicate that she was present in the apartment at times when narcotics activity was being transacted. The focus of some dispute at oral argument on these motions was whether or not Kantor could be heard on one tape asking Marrazzo, after one such meeting, "did they bring the heroin?" to which he allegedly responded, "no, the money."

Pagano, a carpenter, is alleged to have made one or more cabinets with false bottoms for Marrazzo and Tufaro, to the latter of whom he was at one time related by marriage. Although there are conversations among the defendants which indicate that these cabinets were used in the alleged heroin activity, there are no narcotics-related conversations in which Pagano himself is alleged to have participated.

Although the motions of these defendants were separately made, because of their similarity we may apply a similar analysis to them.

Both defendants rely heavily on the fact that they are alleged to have participated in only a fraction of the activities enumerated in the indictment. While this is unquestionably true, it is also misleading. In considering the amount of proof that will be offered against a defendant, we look not only to the number of counts and overt acts alleged, but also to their relative importance. The conspiracy count, with which all three are charged, is the major narcotics count to which all the substantive narcotics counts are linked. We cannot agree that "since [the defendants are] only . . . minor figure[s] in the conspiracy, the vast majority of the evidence against [them] will be irrelevant." Penosi's Brief at 7; nor are these defendants "linked with only one or two of their co-defendants," *Branker, supra,* 395 F.2d at 888. It is at least possible -- if not probable -- that the very nature of the participation of each will only be comprehensible in the context of the activities of the other defendants whom each aided. This is not, of course, to say that Kantor must be tried with Marrazzo, or Pagano with Tufaro, merely because of their relationships. These relationships, however, indicate that the evidence as to the defendants from whom severance is sought will be highly relevant toward establishing the Government's case against these two. It may, of course, prove at trial that the evidence as to the other defendants, while involving the same charges, has no bearing upon one or more of the movant defendants. That, however, is not a matter upon which we can rule at this time.

We turn now to the issue of prejudice. The Government does not contest that the evidence will be "disproportionate" as to these defendants, in comparison with some of their co-defendants. As noted above, they are alleged to have participated in only a few of the many activities which the Government contends were taken in furtherance of the conspiracy. In addition, those activities in which they did allegedly engage are of much less damaging nature than those which the Government asserts it will prove against some of their co-defendants. This is, however, not the end of our consideration since, as stated above, the defendants must demonstrate that any possible prejudice could not be cured at trial. *United States v. Ricco* (2d Cir. 1977) 549 F.2d 264, 274, *cert. denied,* 431 U.S. 905. We find that the defendants have not carried this "heavy burden," *United States v. Sotomayor* (2d Cir. 1979) 592 F.2d 1219, 1229, *cert. denied*, 442 U.S. 919.

Disproportionality of proof is, of course, not enough to entitle a defendant to a severance under Rule 14. *United States v. Losado* (2d Cir. 1982) 674 F.2d 167, 171, *cert. denied,* 457 U.S. 1125; *United States v. Scotto* (2d Cir. 1980) 641 F.2d 47, *cert. denied,* 452 U.S. 961. Even a long trial where numerous defendants are charged with a narcotics conspiracy does not prejudice the right of the individual defendants to a fair trial where "the jury [is] reasonably able to consider the evidence as to the guilt of each, independent of the evidence as to guilt of his fellow defendants." *United States v. Moten* (2d Cir. 1977) 564 F.2d 620, 627, *cert. denied,* 434 U.S. 959. The court in that case found that the jury was so able, where the evidence was not overly complex, was marshalled for the jury, and where the trial judge took other precautions to avoid prejudice to the individual defendants.

We realize, of course, that the evidence in the instant case is likely to be somewhat more complex than in *Moten,* which involved only a single narcotics conspiracy. However, we feel that the nature of Pagano's and Kantor's alleged activities will render the precautions suggested there both feasible and likely to succeed. With respect to the narcotics conspiracy, from the evidence as to which both defendants assert the greatest danger of prejudicial spillover, we reiterate that Pagano is charged with providing furniture used to store narcotics and narcotics proceeds,[23] Kantor with providing the location for much of the alleged narcotics activity. These roles, we think, are sufficiently discrete and unusual to permit easy marshalling of evidence, and also to minimize the possibility that the jury would confuse these two with their fellow defendants. As to the other offenses with which various other defendants are charged, we do not feel that the "narcotics defendants" will be incurably prejudiced by the introduction of evidence of gambling as to Pasqua Jr. and Pasqua Sr.; nor by evidence on the RICO counts, which involve comparatively few defendants. This is not so complex a case or so lengthy an indictment that a juror could not "keep the various charges against the several defendants and the testimony as to each separate in his mind." *United States v. Branker, supra,* 395 F.2d at 888. The court in *Branker* stressed the enormous number of counts in the indictment -- eighty-four -- and the fact that the allegations against some of the defendants and the acts with which they were charged had no connection to others who were charged with much more serious offenses. These factors are simply not present for Pagano and Kantor.

---

[23] Counsel for Pagano has stated, with unassailable accuracy, that "[c]harges of heroin sales undoubtedly have a greater inflammatory effect upon a jury than do accusations of furniture making." Pagano's Memorandum of Law at 9. Be that as it may, however, we are constrained to note that, even were we to sever Pagano from the other defendants, it is unlikely that the Government would charge him with the latter, rather than the former, activity. The fact that, as Pagano asserts, his co-defendants are drug dealers by trade while he is but a carpenter, does not in itself conjure up the hobgoblins of prejudice, since the Government's allegation is precisely that Pagano aided and abetted his colleagues in their socially unacceptable profession by means of his socially acceptable one.

Defendants insist that despite the inconclusive nature of the evidence against them, they might be convicted if the jury imputes to them the guilt of their co-defendants, a possibility which they claim is enhanced because they have no records of prior convictions or "bad acts" such as those which the Government intends to offer into evidence with respect to some of the other defendants. While there is always the possibility of some confusion where co-defendants are alleged to have different levels of guilt, we do not feel that any such problem would be incapable of cure at trial. Defense counsel may at that time raise an objection to the admission of the prior convictions of other defendants under Federal Rule of Evidence 403, which provides that admissible evidence may nonetheless be excluded where its prejudicial impact outweighs its probative value. As the Court of Appeals has said,

> Evidence that might be admissible under Rule 403 in a trial of one defendant is not inevitably admissible in a joint trial. In some situations the danger of unfair prejudice to co-defendants may be so great that the prosecution must be put to a choice of foregoing either the evidence or the joint trial.

United States v. Figueroa (2d Cir. 1980) 618 F.2d 934, 945. We thus decline to find that a severance is required.

We reiterate that both Pagano and Kantor are alleged to have participated in the narcotics conspiracy, which is likely to be the main focus of the evidence and the jury's attention. This is therefore not a case comparable to *United States v. Cambindo Valencia* (2d Cir. 1979) 609 F.2d 603, *cert. denied*, 446 U.S. 940, in which the court found that certain defendants were prejudiced because "[a]lthough they may in fact have been participants in the [main narcotics] conspiracy, there was simply too much other evidence offered of entirely separate actions and unconnected defendants." 609 F.2d at 629. Unlike in *Cambindo Valencia*, the jury here will, as discussed above, be faced with evidence of only one narcotics conspiracy; since we have granted Rosemary Pasqua's and Letizia's motions for severance, there will be no defendants unconnected to the narcotics conspiracy; and, as we have said, we do not feel that the evidence which will be offered as to the related activities (gambling and racketeering) is likely to have a significant prejudicial impact on these defendants.

Penosi

We find, however, that concerns similar to those raised by Pagano and Kantor necessitate a severance as to Penosi. Penosi, who is named only in the narcotics conspiracy count, is alleged to have "received and distributed quantities of narcotics obtained from TUFARO and others and, on occasion, supplied narcotids to TUFFARO [sic] and his distributors." Indictment, Para. 3. He is named in two overt acts: one phone call to Tufaro and one to Tufaro and Marrazzo.

While we do not agree that these allegations are so vague as to require dismissal of the indictment against Penosi (as discussed further below), we find that they do not allege the sort of specific role in the alleged conspiracy which set Pagano and Kantor apart from their fellow defendants. Absent such a basis for distinction, we think there is serious danger that a jury might be unable to consider Penosi apart from the other defendants, as to whom the Government admits much more extensive and serious evidence will be heard.

Nor do we feel that this situation will be alleviated by marshalling the evidence. Such measures, while likely to be effective for Pagano's and Kantor's unique situations, might result, in Penosi's case, in "spending hours or even days telling the jury precisely what it is supposed to forget," *United States v. Branker, supra,* 395 F.2d at 889, thus serving only to reiterate and reinforce for the jury the quantity of evidence of large-scale narcotics activity introduced against the other defendants. In short, we agree that there is a distinct possibility that Penosi will simply be lost among the other alleged participants in the narcotics conspiracy, with no unique features to enable the jury to separate the Government's case against him from the morass of evidence which we are promised. The case against Penosi, unlike the joint trial of his co-conspirators, is a "simple one which would . . . take only a short time to try separately." *United States v. Branker, supra,* 395 F.2d at 888; *see also United States v. Gilbert* (S.D.N.Y. 1980) 504 F.Supp. 565, 566. We therefore grant Penosi's motion for severance.

Sindona

We are, however, unimpressed by Sindona's fears of "prejudicial spillover" caused by his absence from the substantive counts with which the "Tufaro group" is charged. Since there will be no evidence at trial as to the substantive counts in which Sindona is named, there will be no confusion on this score. Although Sindona alleges that the indictment indicates no really damning evidence against him, we note that it places him in fairly regular contact with Pasqua Jr. and in contact with Tufaro, two of the alleged ringleaders of the conspiracy. Although, as we stated above, the evidence at trial will not be restricted to the narcotics conspiracy, we do not think that the additional evidence will prove so confusing, inflammatory, or irrelevant with respect to Sindona as to warrant a severance.

Persico

The Government has indicated that it will dismiss Counts Three through Five as to defendant Persico, and will dismiss, for the sake of convenience, the remaining count (Count One) against him. We therefore need not consider his motion for severance.

Appendix C
Decision of United States District Court

MOTIONS TO SUPPRESS FRUITS OF SEARCHES OF HOMES

Sindona

Sindona contends that a search warrant issued on December 3, 1982, pursuant to which his home was searched and various items seized, was not supported by probable cause. We agree, and order the suppression of these items in any trial in which Sindona may be a defendant.

The affidavit of Agent Keenan in support of the application for the search warrant relies on three assertions of his involvement in narcotics trafficking with Pasqua, Jr. and Tufaro. First, the affidavit relies on the general, continuing links between these men, as above detailed in our treatment of Sindona's motions for severance. Second, the Government describes a pre-planned meeting on September 29, 1982, in which Tufaro and Pasqua, Jr. traveled to Sindona's house. Finally, two days prior to this meeting, Sindona called Pasqua, Jr. to inform him of a change in date for the meeting; some time after which, Pasqua, Jr. told Tufaro of the change, whereupon Tufaro asked if he should still "get the clothes out of the tailor," to which Pasqua, Jr. replied that he should since he still had to "go to lunch" the next day. This conversation, according to Agent Keenan, was probably a coded conversation referring to an impending narcotics transaction.

It is settled law that "it cannot follow in all cases, simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence." *United States v. Lucarz* (9th Cir. 1970) 430 F.2d 1051, 1055. Although we have found from the facts before us that the former exists, we find that the latter does not.

The very cases on which the Government relies demonstrate the fallacy of its contention that "the law assumes" from a person's suspected narcotics activity that narcotics are to be found at his or her residence, in the absence of some link between the residence and a narcotics transaction. Thus, in *United States v. Wood* (10th Cir. 1982) 695 F.2d 459, the affidavit for the search warrant stated that a confidential informant had purchased LSD at the defendant's residence and has seen large quantities of the drug there. Similarly, in *United States v. Valenzuela* (9th Cir. 1979) 596 F.2d 824, 828, *cert. denied*, 441 U.S. 965, "[t]he officer, acting on the informant's tip, saw [defendant] leave his house and drive to where the apparent narcotics transaction with [a known narcotics dealer] took place."

No such link exists here. The Government does not contend that Tufaro or Pasqua, Jr. were carrying anything when they entered or when they left Sindona's house. The conversations of September 27, 1982, while intriguing, provide little support for the Government's contention that narcotics would be present at the meeting of September 29. There is no indication of any link between the discussion about "taking clothes out of the tailor's" and "going to lunch" — which we assume for these purposes to have referred to narcotics — and the discussions about the meeting at Sindona's house. We are not advised as to how much time elapsed between the two parts of the telephone conversation, nor as to what — if anything — occurred between them. We note that the Government does not mention the September 27 conversation in its papers, choosing instead to rely upon the general connections between Sindona, Tufaro, and Pasqua, Jr., and the fact that the men met at Sindona's house, where they had apparently met before. In either event, however, the facts simply do not indicate the presence of narcotics or other pertinent material at Sindona's residence. We therefore grant the motion to suppress the fruits of this search in any trial in which Sindona is a defendant.

Rosemary Pasqua and Pasqua Jr.

Rosemary Pasqua and Pasqua Jr. have both moved for suppression of the fruits of a search of their Staten Island residence. We find that the warrant for this search, issued by Judge Costantino on December 7, 1982, was justified.[24]

Defendants do not contest the fact that various phone conversations which were intercepted pursuant to the wiretap order and its extensions provide evidence that Pasqua, Jr. was involved in gambling activities. They contend, however, that there was no evidence that this activity occurred at the Pasqua residence or that gambling materials would be found there. We disagree.

---

[24] Insofar as defendants' challenge to the application for the warrant is based on the argument that the Liberatore affidavit of September 15, 1982 did not provide probable cause for the original Pasqua wiretap or was otherwise invalid, and thus tainted all ensuing warrants which relied on information gained from the tap, we refer to our decision above upholding the Liberatore affidavit.

The evidence, as set forth in Agent Keenan's affidavit, centers around the following paragraphs:

> 131. On September 27, 1982, at 8:35 p.m., PASQUA received a call from his father, FRANK PASQUA, (SR.), in which his father said that "Nino" was on his way over to borrow money. PASQUA's father told PASQUA to tell Nino that he (PASQUA) could give him $3500 but that he was juggling his "number money" to give him the money. Later at 10:51 p.m., PASQUA called his father and told him he showed Nino the "numbers books" and gave him some money.
>
> 132. On September 28, 1982, Mrs. ROSEMARY PASQUA called WILLIAM CILENTI's house and asked to have "Billy Boy" bring "the envelopes" to her house.

Agent Keenan states that in his experience, "envelopes" refers to gambling material.

Both parties, oddly, fail to mention Mrs. Pasqua's message of September 28, but rather concentrate on the Pasqua Jr.-Pasqua Sr. conversation of the previous day. Defendants contend that, in light of the fact that at that time Pasqua Jr. was running a gambling operation from a trailer on Story Avenue in Brooklyn, there is no indication that Nino saw gambling books at Pasqua Jr.'s home. We think, however, that this is the only natural inference. Pasqua Jr. was at his house during both phone calls with his father, and there is no indication that he went anywhere else in the intervening period. There is likewise no indication that "Nino" was "on his way over" to visit Pasqua Jr. at any location other than where Pasqua Jr. was when the visit was announced. Indeed, in light of Mrs. Pasqua's message it is far more logical to assume that Pasqua Jr. kept at least some of the gambling materials at his home and/or transacted some of his gambling business from there.

Defendants, however, contend that even so interpreted, this information is insufficient to support an application for a search warrant made two and a half months later. According to various conversations reported in the Keenan affidavit, the police seized Pasqua Jr.'s trailer on September 29, 1982. Pasqua Jr. told one Joseph Wilson, on October 1, 1982, that as a result "they're gonna try to get a construction trailer with a permit . . . they're gonna work out of there." Para. 136. Beginning on October 5, 1982, and continuing "over the next two months," Para. 139, Pasqua Jr., Tufaro and Marrazzo "all placed bets on a regular basis" with various unnamed individuals at the Edison Social Club in the Bronx. Agent Keenan concludes that "the more than twenty-five calls [in which such bets were placed] reflected an ongoing gambling business being run out of the Edison Social Club, which FRANK PASQUA, JR. apparently used while his own business was being rebuilt and re-established. Para. 139. This is, we think, a logical conclusion, and one which defendants do not seem to challenge.

We do not think that the mere passage of two and a half months, in itself, makes the information as to Pasqua Jr.'s use of his house for gambling activity stale. Nor do we think that such a result is effected by the change in circumstances which occurred during that time. We think that it is all the more likely that Pasqua Jr. would keep gambling materials at his home while he continued his gambling activity through others at the Edison Social Club, since he did so even when he had his own gambling operation and his own "headquarters." Further, Pasqua Jr.'s regular patronization of the Edison Social Club, together with his plans to recommence his own business, imply that, even if his house would not contain the materials that might be expected from a fully active operation, it would contain evidence of more than a few isolated bets.

It is clear from the face of the warrant itself that the issuing Judge carefully considered the evidence before him, since he struck that portion of the proposed warrant which authorized the search for drugs and other evidence of narcotics activity, granting the warrant only as to gambling material. We think that on the evidence described above this issuance was proper, and therefore deny the motion to suppress.

Tufaro

We similarly reject Tufaro's challenge to the search of his apartment in Douglaston, Queens, executed pursuant to a warrant issued on December 15, 1982 by Magistrate Shira Scheindlin. FBI Special Agent John F. Keenan, in his second and third Riders to his affidavit of December 3, 1982 ("Rider 2" and "Rider 3") states that "[a] reliable confidential informant" had advised another FBI agent that "Tufaro maintains his heroin stash at his residence." Rider 3 at Para. 4. Although the veracity of this unnamed informant is not further detailed, we find that it is sufficiently corroborated to meet the *Gates* test.

Riders 2 and 3 provide both positive and negative corroboration of this tip as to the location of the "stash." Despite the fact that, according to an intercepted conversation held in Marrazzo's apartment on December 9, 1982, Tufaro and Pasqua Jr. planned to transact a narcotics deal that day, a search of Marrazzo's apartment shortly after that conversation yielded no "stash." Rider 2 at Para. 2; Rider 3 at Para. 3a. Tufaro and Pagano had discussed a cabinet with a secret compartment which the latter was to build, and indeed the superintendent of Tufaro's building observed cabinets being moved into Tufaro's apartment shortly prior to his arrest; Marrazzo also possessed a cabinet with a secret compartment, built by Pagano, in which approximately $90,000 was found at the time of his arrest. Rider 3 at

Para. 5. At the time of their arrests, Tufaro and Marrazzo had in their possession identical sets of keys which fit the locks of Tufaro's building, apartment and garage, and which were "similar to the keys used on the locks on Marrazzo's apartment." Both sets of locks were installed by the same locksmith. Rider 2 at Paras. 3-5; Rider 3 at Paras. 3-4. Finally, despite the obvious use of Marrazzo's apartment for cutting heroin -- the air conditioner filter yielded an ounce of heroin which had apparently been collected from the air -- and the discussions between Marrazzo and Tufaro of various records of narcotics activity, neither the "stash" nor these documents were found in Marrazzo's apartment or elsewhere. Rider 3 at Para. 7.

We find that, in the totality of the circumstances, this information, together with the allegation of the reliability of the informant, was enough to justify the Magistrate in finding that probable cause existed to believe that Tufaro kept narcotics, narcotics proceeds, or evidence thereof at his apartment. We recognize that the evidence of this is not as strong as that supporting some of the other challenged warrants; however, we must reject Tufaro's challenges as being overly reliant upon a pre-*Gates* analysis stressing the necessity of a detailed description of the veracity of the informant, and upon the individual pieces of supporting information rather than the affidavits in their entireties. Read in this latter light, as they must be, *see United States v. Harris* (1971) 403 U.S. 573, 577, we think that the affidavits indicate a reasonable probability that some contraband would in fact be found at the long-hidden residence of Tufaro. The fact that some of these circumstances are also subject to innocent interpretations, as defendants urge, does not alter the fact that suspicious interpretations are not only also possible, but in at least some instances much more probable. We therefore deny the motion.

Marrazzo and Kantor have both moved to suppress all evidence obtained from a search of the apartment rented to Kantor and inhabited by Marrazzo. We need not discuss the issue of their standing to make these motions, as we find that both motions, which rely solely on the defendants' challenges to the validity of the various wiretaps and "bugs," are without merit.

MOTIONS TO SUPPRESS STATEMENTS

Tufaro

Tufaro has moved to suppress two statements allegedly made to his attorney immediately prior to his arraignment and overheard by Agent Liberatore, namely, "they'll never find my apartment" and "you got to get me out." While we do not see that this latter statement is especially prejudicial, we grant the motion.

Tufaro was arrested on December 9, 1982, at 1:15 p.m., and was given his first opportunity to speak to a lawyer almost twenty-four hours later. This consultation, the only one allowed Tufaro prior to arraignment, was held in the hallway outside the Magistrate's Courtroom. Agent Liberatore insisted that "Due to the congestion of the area . . . it was necessary, in order to maintain order and control, that the attorney talk to their [sic] client within my view." Tufaro states additionally that Agent Liberatore limited the space in which he could speak with his counsel, and that, conscious of the Agent's presence, he attempted to speak softly to avoid being overheard.

We cannot accept, in these circumstances, the Government's assertion that Tufaro's statements are undeserving of the privilege normally accorded conversations between attorney and client because they were made in a public place and in the hearing of other people. The cases which apply this exception to the rule of privilege address situations in which a client chooses to speak in a non-confidential location rather than in private. See, *e.g.*, *United States v. Gartner* (2d Cir. 1975) 518 F.2d 633 (defendant and counsel discussed trial strategy in presence of a defendant who was known to be cooperating with the Government). No such choice was afforded Tufaro here: he had but one time, and one location, to confer with his attorney before his arraignment, a "critical stage of the prosecution," *Kirby v. Illinois* (1972) 406 U.S. 682, 689-90. We therefore find that these statements are deserving of the full protection of the attorney-client privilege. "Where there is an intrusion on the attorney-client relationship the remedy for such violation is . . . the suppression of any evidence so obtained." *United States v. Sander* (5th Cir. 1980) 615 F.2d 215, 219, *reh. denied,* 618 F.2d 781, *cert. denied,* 449 U.S. 835. We accordingly grant the motion to suppress.

Letizia

Upon being taken to the FBI office after his arrest, Letizia refused to sign a waiver of his *Miranda* rights, but did answer several questions, to the effect that he did not know several of the other defendants in this case. He then cut off questioning by indicating that he did not wish to speak further until he had consulted an attorney. As the Government has stated that it does not intend to offer, as part of its case-in-chief, any statements made after this, we consider only those statements made before Letizia formally invoked his *Miranda* rights. Letizia alleges that when he was arrested at 8:18 p.m. on December 9, 1982, he was dressed inadequately for the cold weather and was distraught due to illness and concern over some medical tests that his doctor had recently recommended.

Although this portion is never coherently stated, he appears to allege that he never waived his *Miranda* rights because his physical and mental condition, lack of medication and warm clothing prevented him from having the necessary comprehension of his legal position to make such a waiver in the rational, intelligent fashion required by the courts. *United States v. Mohabir* (2d Cir. 1980) 624 F.2d 1140.

While he accurately cites much law on the subject, we are unconvinced by the facts of his situation. The mere refusal to sign a waiver of *Miranda* rights, by itself, does not indicate that subsequent answers were involuntary or not intelligently made. *United States v. Bosby* (11th Cir. 1982) 675 F.2d 1174, 1182, n.13. We are unconvinced that Letizia was "coerced" or unable to make an intelligent decision because of his alleged condition. Mere illness or emotional stress, where not disabling, does not vitiate the questioning of a defendant. *United States ex rel Ward v. Mancusi* (2d Cir. 1969) 414 F.2d 87, 88-89. We find no evidence that Letizia was in fact incapacitated. He does not claim to have been too distraught to exercise the opportunity offered him to make phone calls which could have brought him medication and clothing, or to make any other kind of intelligent decision. In these circumstances, we cannot find that he was in any way coerced or unable to assess his legal position prior to requesting an attorney, and we decline to suppress his statements made prior to that point.

Rosemary Pasqua

Minimization of Interception

Rosemary Pasqua contends that the Government failed adequately to minimize a conversation in which she discussed her husband's gambling activities with one Loraine Zippilli, in violation of 18 U.S.C. § 2518(5) and of the "Instructions for Electronic Interception"

("Instructions") of the telephone subscribed to by her husband, Pasqua Jr., on which the call was received.[25] We agree, and order the suppression of this conversation in any trial in which she is a defendant.

18 U.S.C. § 2518(5) provides, in relevant part:

> Every order [authorizing or approving the interception of wire communications] and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.

Paragraph 10 of the Instructions, which were issued in consonance with the wiretap order and which bear the signature of the Assistant United States Attorney, reads as follows:

> *PATTERNS OF INNOCENCE*
>
> 10. If, after several days or weeks of interception, we have learned that conversations between our named subjects and a particular individual or individuals are invariably innocent, non-crime related matters, then a "pattern of innocence" exists and such conversations should not be recorded, listened to, or even spot monitored.

Between September 15, 1982, when the interception of the Pasquas' phone started, and October 1, 1982, the date on which the conversation at issue took place, Mrs. Pasqua had had at least twenty-five conversations with various female friends, including three lengthy conversations with Lorraine Zippilli. Each of these conversations was deemed "non-pertinent" or was too brief to be judged for pertinence. No conversations between Rosemary Pasqua and any woman involved any discussion of gambling-related activity.[26] We set forth a brief summary of Mrs. Pasqua's monitored conversations.

---

[25] Mrs. Pasqua also contended initially that various other conversations were insufficiently minimized under other provisions of the Instructions. This contention appears to have been dropped, correctly we think.

On September 20, five days after interception began, Mrs. Pasqua had four conversations with female friends. These conversations centered around plans to visit a sick friend in the hospital. One of these conversations, to Lorraine Zippilli, also involved various personal matters, such as their children, which the women had apparently not discussed for some time. On September 21, Rosemary Pasqua had a further conversation with a friend for whom she had left a message the previous day, again on the subject of their mutual friend in the hospital. On September 28, Mrs. Pasqua made four telephone calls, this time with respect to a party which she was planning for her female friends.[27] In addition to plans for the party, she and her friends discussed their recent activities and those of other mutual friends. One of these calls, to Lorraine Zippilli, also concerned Mrs. Zippilli's family problems. Finally, on October 1, Mrs. Pasqua discussed the party with a friend. Later that same evening, she received a call from Lorraine Zippilli, during which the two discussed who was coming to the party, and at the conclusion of which Mrs. Zippilli told Mrs. Pasqua she would call back between 9:00 and 9:30. This promised call, made at 9:09 that evening, is the one at issue.

---

[26] The Government raises for the first time in its "Letter in Opposition" the contention that "shortly after the alleged 'pattern of innocence' emerged, Mrs. Pasqua began to converse with her sister-in-law and 'various women friends' about stolen merchandise, which Mrs. Pasqua was selling." Letter at 4. No support is given to this allegation, and we thus decline to consider it.

[27] Counsel for Mrs. Pasqua states that "In the intervening week there were numerous non-pertinent conversations with other women who were not, apparently, part of [Mrs. Pasqua's] group [of friends]. Letter at 3. We have not been advised of the substance of these conversations; however, the Government does not appear to contest their characterization as "non-pertinent."

In light of these circumstances, we find that it would have been unreasonable for the persons monitoring the conversation not to conclude that it, like Mrs. Pasqua's other conversations with Lorraine Zippilli and her other female friends, would consist of matters not pertinent to the subject of their investigation. In the precise terms of the Instructions, two weeks had passed without any indication that any conversation between Rosemary Pasqua and any female friend, or Lorraine Zippilli in particular, bore any connection to the illegal gambling operation in which Mrs. Pasqua was suspected of being a participant.

We reject the Government's various disingenuous arguments against this straightforward violation of its orders. The fact that the final conversation between Rosemary Pasqua and Lorraine Zippilli did in fact contain references to the subject of the investigation does not in any way alter the fact that a clear pattern of discussions about “innocent, non-crime related matters' had preceded it for over two weeks. The Government's argument boils down to the proposition that a search is legal if its results are indicative of criminal activity, a theory which we need spend little time in refuting, except to reiterate that we must judge the propriety of the monitoring in accordance with the situation at that time. *Scott v. United States* (1978) 426 U.S. 128. Likewise, the fact that Mrs. Pasqua's conversations with various men do indicate her involvement in narcotics activity does not remove her conversation with Mrs. Zippilli from the proscription of paragraph 10. The Government's tautological argument would have us find that where there is evidence that a suspect conducts conversations with one person or group of people as to the illegal activity under investigation, the Government may monitor all their conversations with anyone. This is not the law. 18 U.S.C. § 2518(5)'s provision that every order authorizing electronic surveillance must include a “minimization provision” covers precisely such circumstances. We are also not impressed by the fact that the conversation at issue was minimized in that it was spot monitored rather than being monitored in its entirety. Paragraph 10 of the Instructions clearly states that even such limited monitoring is improper once a pattern of innocence has been established.

In finding that such a pattern existed here, we are not requiring the monitoring agents to have "perfect retrospective prescience," as the Government claims. Letter in Response at 2. We realize, of course, that agents who hear dozens, perhaps hundreds, of telephone calls during the course of a single day cannot be expected to keep straight the identity of every voice heard over the telephone for a brief period of time. However, the line here is not nearly so difficult to draw. As we stated above, no telephone call between Rosemary Pasqua and any woman, prior to the conversation at issue, contained any information whatsoever as to illegal gambling activity. While individual voices may be difficult to determine, even after they have been heard in long conversations like those between Mrs. Pasqua and Lorraine Zippilli, it is not so difficult to determine whether a woman is talking with another woman, nor to remember that all female-female conversations over the intercepted wire have been innocent.

Nor are we faced with a situation like that in *United States v. Bynum* (2d Cir. 1973) 485 F.2d 490, in which the court rejected a challenge to the monitoring of 73 "clearly innocent" calls of three minutes or more between the suspect's babysitter and her friends. In that case, the monitoring agents had reason to suspect that the babysitter's conversations would contain pertinent information where it was not initially clear that she was uninvolved in criminal activity and where, even when her innocence became apparent, it was discovered that she "was used to transmit messages and on occasion did reveal the whereabouts of [the suspect] and the company he was keeping." 485 F.2d at 502. No such pertinent information could reasonably have been expected to have been transmitted in the conversations between Rosemary Pasqua and her female friends, on the basis of the conversations with which the monitoring agents should have been familiar at the time of the conversation at issue. Nor do we think it likely, as did the court in *Bynum,* that another person "with more pressing problems" would interrupt Mrs. Pasqua's conversations to transmit such information. Nor, finally, does the Government argue that they could not determine within the first two weeks of the interception that Mrs. Pasqua's conversations with female friends not only commenced, but remained, on innocent, personal subjects unconnected to the ongoing investigation. We therefore find that the monitoring agents should not have listened to the conversation at issue, and therefore order its suppression, in any trial in which Rosemary Pasqua is a defendant.

Post Arrest Statements

The Government acknowledges that Rosemary Pasqua was questioned, and made certain statements, before being informed of her *Miranda* rights. However, it has agreed that it will not offer these statements, except as permitted for purposes of impeachment by *Harris v. New York* (1971) 401 U.S. 222. Since they may be used by the Government for this limited purpose, we decline at this time to preclude their use altogether.

REMAINING MOTIONS

We need devote little time to the remaining motions.

The defendants named in the conspiracy charges have moved for a hearing, at some point before the trial, to determine whether there exists sufficient evidence of a conspiracy and of their participation in it, apart from the hearsay statements of co-conspirators, to justify admitting those hearsay statements. Such a determination is, of course, required by the law of this Circuit to be made at the close of the Government's case. *United States v. Geaney* (2d Cir. 1969) 417 F.2d 1116, *cert. denied* (1970) 397 U.S. 1028. We see no reason either in the law of this Circuit or the facts of this case why we should depart from this procedure.[28] We therefore decline to adopt the practice enunciated for the Fifth Circuit in *United States v. James* (5th Cir. 1979) 590 F.2d 575, *cert. denied,* 442 U.S. 917, of holding such a hearing prior to the commencement of trial.

Tufaro has moved to strike references to his alias "Donnie Boy," on the ground that it is inherently prejudicial surplusage. We cannot, of course, take judicial notice of the correctness or incorrectness of the view of the professor who said "if I were a judge I would never sit down with anyone named *Johnny* Boy,"[29] nor do we agree with defendant's implicit assumption that the jurors will either be familiar with this article (of which we note we had never heard) or share its charmingly expressed views. The motion is denied.

However, we find merit in Tufaro's motion to preclude use of a 1963 narcotics conviction. Rule 609(b) of the Federal Rules of Evidence militates against the use of proof of a prior crime where the defendant's conviction or release from prison occurred more than ten years in the past. Since Tufaro was released in 1966, this conviction clearly falls under this rule. The Government contends, however, that the running of the ten years should be tolled for the years when Tufaro was a fugitive, since (according to it) the ten-year rule is based on a presumption of rehabilitation which is rebutted when a defendant is a fugitive from another indictment. We are aware of no authority in support of this contention, and we reject it.[30]

---

[28] Indeed, counsel for Sindona, who had made this motion, acknowledged at oral argument that "there is no law citation that says you can have" such a hearing before the commencement of a trial. Tr. at 17.

[29] This statement has been cited to us only as a quote from "G. Robert Blakey, law professor at Notre Dame University in *Newsday*, February 7, 1983."

Penosi moves for dismissal of the counts against him on the ground that insufficient evidence was presented to the grand jury to uphold the indictment. In connection with this motion, he requests that we inspect the grand jury minutes. We deny both motions. Contrary to Penosi's contention, his alleged role in the conspiracy is amply spelled out by paragraph 3, which states that he, along with others, "received and distributed quantities of narcotics obtained from Tufaro and others and, on occasion, supplied narcotics to TUFFARO [sic] and his distributors." We decline to find from the fact that Penosi is not named in any distribution count or overt act, that this statement is no more than "prejudicial surplusage," as defendant claims. Although the evidence against Penosi may not be strong in comparison with that against other defendants, we decline to find at this stage in the proceedings that under no circumstances could the Government prove its case. We see no need to inspect the grand jury minutes to arrive at this conclusion; and, as defendant notes, such inspection is not mandatory but is left to our discretion. *Costello v. United States* (1956) 350 U.S. 359; *United States v. Tane* (2d Cir. 1964) 329 F.2d 848.

Penosi has also requested that we conduct an "audibility hearing" of certain tapes which, we assume, the Government intends to introduce at trial. A determination of the tapes' audibility can, we feel, be as easily made at a point closer to their introduction, and we therefore deny the motion.

---

[30] The Government also urges that the prior conviction be admitted "in the interests of fairness" since other defendants have convictions stemming from the same era. We assume that at some point before the Government seeks to introduce these convictions, the defendants will move to prohibit such introduction.

We grant Rosemary Pasqua's motion to suppress evidence of the exasperation which she may have vented on her children and husband, which might suggest that she was not a good mother or otherwise had bad character traits.

Two defendants have made motions to be provided with certain forms of discovery. One, Penosi, was added in the superceding indictment and thus was unable to join in the discovery motions made by the other defendants and heard by us on February 3, 1983. Since the motions for a bill of particulars and various material alleged to be due under *Brady v. Maryland* (1963) 737 U.S. 83, are similar to those made by various other defendants at that time, we direct the Government to provide the information requested in the same manner as it was directed so to do in our rulings on the other motions. The second moving defendant, Pasqua Sr., who now requests a bill of particulars, was present and amply represented at the prior hearing on discovery motions, where he in fact made a similar motion. Since we have been provided with no reason to hear his renewed motion again, out of time, it is denied.

SUMMARY

In sum, we grant the following motions:

severance of Letizia, Rosemary Pasqua, and Penosi;

suppression of the fruits of the search of Sindona's home;

suppression of Tufaro's statements to his attorney prior to arraignment;

suppression of Rosemary Pasqua's conversation of October 1, 1982 with Lorraine Zippilli in which Pasqua Jr.'s gambling activities were discussed;

preclusion of the use at trial of Tufaro's 1963 narcotics conviction;

suppression of Rosemary Pasqua's statements indicating exasperation with her husband and children, insofar as these are to the offenses charged.

In addition, we expect that the Government will take the following actions, as indicated in its papers and at oral argument:

dismiss, without prejudice, all charges against Persico;

dismiss, without prejudice, as to Sindona on Counts Three, Four and Five;

not attempt to introduce, in its case in chief, any of Letizia's post-arrest statements made after he had raised the subject of counsel, or any statements made by Rosemary Pasqua in response to questioning before she was informed of her *Miranda* rights;

allow an audibility hearing as to all tapes as to which there are questions of audibility, before attempting to introduce them at trial.

All other motions are denied.

This matter is set down for trial on November 7, 1983.

SO ORDERED.

Dated; New York, New York
October 11, 1983

WHITMAN KNAPP, U.S.D.J.